RECORD.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 15,800.
CRIMINAL.

JOSEPH COSTELLO,
APPELLANT,

vs.

UNITED STATES OF AMERICA,
APPELLEE.

No. 15,801.
CRIMINAL.

JOSEPH JOHN CANNELLA,
APPELLANT,

vs.

UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI.

Printed Record

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[fol. 2] (Indictment.)

(Filed in U. S. District Court on April 23, 1956.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
v.
Joseph Costello, a/k/a George Costello, and Joseph John Cannella,
Defendants.
No. 28578 (1)

The Grand Jury charges:

That on or about December 22, 1955, within the Eastern Division of the Eastern Judicial District of Missouri, the defendants,

Joseph Costello, a/k/a
George Costello, and
Joseph John Cannella,

did unlawfully ship and transport and cause to be shipped and transported in interstate commerce, from Granite City, Illinois, to St. Louis, Missouri, a firearm, to wit, one Smith & Wesson .38 caliber "Chief Special" revolver, bearing Serial No. 68897, defendant Joseph Costello having prior thereto been convicted of a crime of violence, to wit, the crime of burglary, in the Circuit Court of St. Francois County, Missouri.

In violation of Section 902 (e), Title 15, and Section 2, Title 18, United States Code.

Second Count.

The Grand Jury further charges:

That on or about December 22, 1955, within the Eastern Division of the Eastern Judicial District of Missouri, [fol. 3] the defendants,

Joseph Costello, a/k/a
George Costello, and
Joseph John Cannella,

did unlawfully ship and transport and cause to be shipped and transported in interstate commerce, from Granite City, Illinois, to St. Louis, Missouri, a firearm, to wit, one Smith & Wesson .38 caliber "Chief Special" revolver, bearing Serial No. 65965, defendant Joseph Costello having prior thereto been convicted of a crime of violence, to wit, the crime of burglary, in the Circuit Court of St. Francois County, Missouri.

In violation of Section 902 (e), Title 15, and Section 2, Title 18, United States Code.

Third Count.

The Grand Jury further charges:

That on or about December 22, 1955, at St. Louis, Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, the defendant,

Joseph Costello, a/k/a
George Costello,

did unlawfully receive a firearm, to wit, one Smith & Wessor .38 caliber "Chief Special" revolver, bearing Serial No. 68897, which had been shipped in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, said defendant having prior thereto been convicted of a crime of violence, to wit, the crime of burglary, in the Circuit Court of St. Francois County, Missouri.

In violation of Section 902 (f), Title 15, United States Code:

Fourth Count.

The Grand Jury further charges:

That commencing on or about the first day of June, [fol. 4] 1955, and up to and including the date of the return of this indictment, in the City of St. Louis, within the Eastern Division of the Eastern Judicial District of Missouri, the defendants,

Joseph Costello, a/k/a
George Costello, and
Joseph John Cannella,

did unlawfully combine, conspire, confederate and agree together with each other, and with divers other persons, whose true names and identities are to the Grand Jury unknown, to commit offenses against the laws of the United States by transporting and shipping and causing to be transported and shipped in interstate commerce, from Granite City, Illinois, to St. Louis, Missouri, certain firearms, to wit, certain Smith & Wesson .38 caliber "Chief Special" revolvers, and by having defendant Joseph Costello receive a firearm of the aforesaid description which had been shipped and transported in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, defendant Joseph Costello, prior to the aforesaid date of the inception of the conspiracy, having been convicted of a crime of violence, to wit, the crime of burglary, in the Circuit Court of St. Francois County, Missouri. In furtherance of the said conspiracy, the following overt act was committed: On or about December 22, 1955, defendant Joseph Cannella obtained several Smith & Wesson .38 caliber "Chief Special" revolvers, including those bearing Serial Nos. 68897 and 65965, from one Earl Lewis in Granite City, Illinois.

In violation of Section 371, Title 18, United States Code.

A True Bill.

(s) LEO M. ZILLIKEN,
Foreman.

(s) HARRY RICHARDS,
United States Attorney.

[fol. 5] Motion of Defendant Joseph Costello to Dismiss Indictment.

(Filed in U. S. District Court on June 11, 1956.)

Comes now defendant Joseph Costello and moves the Court to dismiss each Count of the indictment, and for his reasons therefor states and alleges:

1. That each count of the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

2. That it appears upon the face of the indictment that no offense or crime against the laws of the United States was committed by this defendant.

3. That each count of the indictment does not state facts sufficient to constitute an offense for the reason that they do not charge all of the essential elements, respectively, under Title 15, U. S. C., Section 902 (e), Title 15, U. S. C., Section 902 (f), Title 18, U. S. C., Section 2, and Title 18, U. S. C., Section 371.

4. That the indictment does not state sufficient facts to enable the defendant to plead the judgment of the Court in bar of a further prosecution for the same alleged acts.

5. That Title 15, Section 902, the statute upon which the indictment is based, is unconstitutional, in that the same is unreasonable and arbitrary, does not set out an ascertainable standard of conduct, and permits a convic-
[fol. 6] tion of the defendant without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

MORRIS A. SHENKER,
Attorney for Defendant
Joseph Costello.

[fol. 7] (Motion of Defendant, Joseph Costello, to Suppress.)

(Filed in U. S. District Court on June 11, 1956.)

Defendant, Joseph Costello, aggrieved by an unlawful search and seizure made by peace officers of his automobile in which the officers state that they seized guns in a search outside of his presence, moves the Court to suppress, as evidence against him any and all articles allegedly taken by means of such search and seizure and any evidence gained by the peace officers by means of such search and seizure. The grounds for this motion are as follows:

1. The search and seizure were made without warrant and without authority.

2. The defendant did not violate any law in the presence of the peace officers.

3. The peace officers arrested the defendant without both reasonable cause and probable cause that he had violated any law.

4. The search and seizure were not made incident to an arrest.

5. Evidence obtained by such an illegal search and seizure is inadmissible in both the State Courts of Missouri and the Federal Courts.

6. Such search and seizure was unreasonable and the use of any evidence so obtained would violate Article I, Section 15 of the Missouri Constitution and would compel [fol. 8] defendant to give testimony against himself in violation of Article I, Section 19 of the Missouri Constitution and the use of such evidence in any criminal case insofar as State officers participated in such search and seizure would deprive defendant of his liberty without due process of law in violation of Amendment 14 of the United States Constitution.

7. By reason of the foregoing, the use of such evidence against the defendant in a criminal case in the Federal Courts in a State which also excludes illegally obtained evidence in trials in its Courts is inadmissible in this proceeding whether or not federal officers participated in said search and seizure because (a) it violates the proper standards for the enforcement of the federal criminal laws in Federal Courts (b) it violates the unreasonable search and seizure clause of Amendment 4 of the United States Constitution and (c) it compels defendant to give testimony against himself in violation of the self-incriminating clause of Amendment 5 of the United States Constitution.

MORRIS A. SHENKER,
Attorney for Defendant
Joseph Costello.

[fol. 9] Motion of Defendant Joseph John Cannella to Dismiss Indictment.

(Filed in U. S. District Court on June 11, 1956.)

Comes now defendant Joseph John Cannella and moves the Court to dismiss Counts I, II, and IV of the indictment, and for his reasons therefor states and alleges:

1. That this defendant was subpoenaed and compelled to testify before the Grand Jury which returned this indictment and which was then preparing to indict him on the charges alleged in the indictment; that defendant was interrogated before said Grand Jury on the matters and things charged in the indictment; that this defendant was not at any time advised or warned by the Grand Jury, by the United States Attorney, or by the Assistant United States Attorney conducting the said Grand Jury inquiry that he would be indicted or that his own conduct and activities were under investigation. The said compulsory testimony of this defendant, without warning him that he was the subject of the Grand Jury inquiry or that he would be indicted by the Grand Jury, and the use of any and all evidence obtained directly or indirectly therefrom, was and is violative of this defendant's privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

2. That each count of the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

[fol. 10] 3. That it appears upon the face of the indictment that no offense or crime against the laws of the United States was committed by this defendant.

4. That Counts One, Two, and Four of the Indictment, as to this defendant, do not state facts sufficient to constitute an offense for the reason that they do not charge all of the essential elements, respectively, under Title 15, U. S. C., Section 902 (e), Title 18, U. S. C., Section 2, and Title 18, U. S. C., Section 371.

5. That the indictment does not state sufficient facts to enable the defendant to plead the judgment of the Court in bar of a further prosecution for the same alleged acts.

6. That Title 15, Section 902, the statute upon which the indictment is based, is unconstitutional, in that the same is unreasonable and arbitrary, does not set out an ascertainable standard of conduct, and permits a conviction of the defendant without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

MARK M. HENNELLY,
Attorney for Defendant Joseph John Cannella.

[fol. 11] Motion of Defendant Joseph John Cannella to Suppress Evidence.

(Filed in U. S. District Court on June 11, 1956.)

A.

Comes now defendant Joseph John Cannella and moves the Court to suppress as evidence the defendant's testimony before the Grand Jury which returned the instant indictment against him, and further to suppress all evidence obtained directly or indirectly from his testimony before said Grand Jury, and as grounds therefor states and alleges:

1. That this defendant was subpoenaed to appear and to testify before the Grand Jury which returned this indictment against him.

2. That this defendant did, in response to said subpoena, appear before said Grand Jury, was interrogated relative to the matters upon which he was subsequently indicted, and did testify with regard to said matters.

3. That the said Grand Jury was at the time of this defendant's appearance conducting an investigation regarding the activities of this defendant in order to determine whether the defendant had violated any of the laws of the United States.

4. That the defendant was not at any time advised or warned by the Grand Jury or by the United States Attorney, or by the Assistant United States Attorney conduct-

[fol. 12] ing said Grand Jury inquiry that he was himself under investigation by said Grand Jury, or that he could not be compelled to testify against himself.

5. That the use of this testimony before the Grand Jury and any and all evidence obtained directly and indirectly therefrom would constitute a violation of defendant's privilege against self-incrimination, as guaranteed by the Fifth Amendment to the Constitution of the United States, in that this defendant was compelled to appear and give testimony before the Grand Jury without being advised prior to his testimony that he was himself under investigation by the Grand Jury or that he could not be compelled to testify against himself.

B.

Defendant, Joseph Cannella, aggrieved by an unlawful search and seizure made by peace officers, moves the Court to suppress as evidence the guns and any and all articles allegedly taken by means of such search and seizure and any evidence gained by the peace officers by means of such search and seizure. The grounds for this motion are as follows:

1. The search and seizure were made without warrant and without authority.

2. The search and seizure were made without probable cause.

3. The search and seizure were not made incident to an arrest.

4. Evidence obtained by such an illegal search and seizure is inadmissible in both the State Courts of Missouri and the Federal Courts.

5. Such search and seizure were unreasonable and the use of any evidence so obtained would violate Article I, Section 15 of the Missouri Constitution and would compel defendant to give testimony against himself in violation of Article I, Section 19 of the Missouri Constitution and the use of such evidence in any criminal case insofar as [fol. 13] State officers participated in such search and seizure would deprive defendant of his liberty without

due process of law in violation of Amendemnt 14 of the United States Constitution.

6. By reason of the foregoing, the use of such evidence against the defendant in a criminal case in the Federal Courts in a State which also excludes illegally obtained evidence in trials in its Courts is inadmissible in this proceeding whether or not federal officers participated in said search and seizure because (a) it violates the proper standards for the enforcement of the federal criminal laws in Federal Courts. (b) it violates the unreasonable search and seizure clause of Amendment 4 of the United States Constitution and (c) it compels defendant to give testimony against himself in violation of the self-incriminating clause of Amendment 5 of the United States Constitution.

MARK M. HENNELLY,
Attorney for Defendant Joseph John Cannella.

[fol. 14] Motion of Defendant, Joseph John Cannella, to Inspect Grand Jury Minutes.

(Filed in U. S. District Court on June 11, 1956.)

Comes now defendant Joseph John Cannella, and moves the Court for an order authorizing him to inspect and copy certain Grand Jury testimony, as follows:

1. To inspect and copy the minutes and transcript of this defendant's testimony before the Grand Jury which returned the indictment herein, for the reason that a copy of the minutes and transcript of said Grand Jury testimony is necessary for the preparation of his defense in order that he may be fully informed as to the matters to which he testified before said Grand Jury.

2. To inspect and copy the minutes and transcript of the Grand Jury testimony of all witnesses who testified prior to this defendant's appearance before the Grand Jury, and who testified relative to the transactions which were the subject of inquiry at the time this defendant testified, for the reasons that this defendant is entitled

to show by said testimony that he was himself under investigation at the time he was subpoenaed by the Grand Jury for the purpose of indicting him on the offenses charged in the indictment.

MARK M. HENNELLY,
Attorney for Defendant Joseph John Cannella.

[fol. 15] Supplemental Motion of Defendant Joseph Costello to Dismiss Indictment.

(Filed in U. S. District Court on July 23, 1956.)

Comes now defendant Joseph Costello and adds the following additional grounds to his motion to dismiss the indictment herein:

1. That Counts One, Two and Three of the indictment charge the defendant with the commission of the same alleged offense in such manner that he could be convicted three times for the commission of the same alleged offense under this indictment.

2. That Counts One and Two of the indictment charge the defendant with the commission of the same alleged offense in such manner that he could be twice convicted for the commission of the same alleged offense under said Counts of the indictment.

MORRIS A. SHENKER,
Attorney for Defendant Costello.

[fol. 16] Supplemental Motion of Defendant Joseph John Cannella to Dismiss Indictment.

(Filed in U. S. District Court on July 23, 1956.)

Comes now defendant Joseph John Cannella and adds the following additional ground to his motion to dismiss the indictment herein:

1. That Counts One and Two of the indictment charge the defendant with the commission of the same alleged

offense in such manner that he could be twice convicted for the commission of the same alleged offense under said Counts of the indictment.

MARK M. HENNELLY,
Attorney for Defendant Cannella.

[fol. 17a] (Transcript of Proceedings on October 12, 1956, at hearing on various motion of defendants.)

JEREMIAH SULLIVAN testified as follows:

Direct Examination, by Mr. Shenker.

I am a police officer in the St. Louis Police Department holding the title of Detective Sergeant. I was so engaged during the entire year of 1956, but I was a corporal prior to June of 1956.

On February 27, 1956, I had occasion to see Mr. Joseph Costello under arrest in the Central District near the booking stand, and I also saw him up in our office, which is on the fourth floor and which is known as the Detectives' Office. I did not participate in the arrest.

When I first saw Mr. Costello being booked it was about a quarter to nine in the morning. I spoke to Detective Richters and after that I went to our office on the fourth floor and hung up my hat and coat. I then went to the Central District garage alone at a little bit before 9 o'clock. I met the garage attendant. Mr. Costello was in custody all that time. I obtained the keys to Costello's car from the attendant. With one of the keys I opened the trunk of the car and searched it. Mr. Costello was not there at the time. He was in headquarters in the holdover. The garage is in the building right adjoining the headquarters.

After searching the trunk I used one of the keys and opened the door to the automobile and searched the inside and with one of the keys I opened the glove compartment. These keys were the keys turned over by Mr. Costello.

In the glove compartment I found two guns. One was a .38 Smith and Wesson revolver and the other was a Derringer.

The Derringer had no number on it.

(It was stipulated between the parties that the .38 Smith and Wesson found in the glove compartment was No. 68897 and was one of the guns mentioned in the indictment in this cause.)

I took the guns out and I then locked up the car and left it where it was and returned the keys to the attendant. At no time during my search was Mr. Costello with me or present near the car. I had no conversation with Mr. Costello prior to searching the car. I then returned to our office on the fourth floor. Prior to the time of the search I did not have a search warrant.

Cross-Examination, by Mr. Boecker.

There were no officers of the Federal Government present at the time of the search.
[fol. 17b] I had no arrangement, nor was I in communication with them on that day regarding this matter or in that connection.

Redirect Examination, by Mr. Shenker.

Q. Well do you know what communications there were with your office pertaining to Mr. Costello or the Police Department pertaining to Mr. Costello immediately prior to that or immediately after this incident about which you state?

Mr. Boecker: I object to that calling for hearsay.

The Court: Sustained.

Of my own knowledge I do not know of any communication between the Police Department and the Federal Bureau of Investigation pertaining to Mr. Costello immediately prior to the arrest of Mr. Costello.

ROBERT RICHTERS testified as follows:

I am a detective of the Metropolitan Police Department of the City of St. Louis, and I was so engaged on the 27th day of February, 1956.

On that date I had occasion to see Mr. Costello as I placed him under arrest at Tower Grove and Blaine in the City of St. Louis. That was approximately five minutes after seven on the morning of February 27. At the time he was operating his automobile, which was a 1954 or 1955 black Cadillac convertible.

We observed Mr. Costello operating his car immediately in front of us and we pulled into the curb and placed him under arrest at Tower Grove and Blaine. At that particular time I saw him violate no law, and I had no warrant for his arrest. At no time did I see Mr. Costello violate any law.

After placing him under arrest I started to question him about the murder of Robert Brown. I then searched the trunk of his automobile and then conveyed him to police headquarters. He drove his car and I followed directly behind him and my partner rode with him in his car. My partner was Detective Edward O. Boni. We were there for approximately five minutes before starting out to headquarters. We arrived at headquarters at approximately 7:20 or 7:25. We placed Mr. Costello's car in Central District garage and locked the car. We then took him to the desk that is in the garage and turned over the keys to the garage attendant. I turned the keys over to the attendant. We then took Mr. Costello into the Central District at the booking desk where he was booked. He remained under arrest from then on. He was under arrest from 7:05 when we first stopped him.

[fol. 17c] We took Mr. Costello up to the second floor holdover and left him there. We did not question him there. We placed him in the morning showup.

When I took Mr. Costello into the station about 7:20 or 7:25 I took some of Mr. Costello's personal property from the car with him. It consisted of $6,575.10.

After the arrest some F. B. I. agents came over to examine the money. It was about three quarters of an hour after the arrest. It would have been somewhere around 9:30. After we had Mr. Costello in the showup and brought him back from the showup the F. B. I. agents were there. It was approximately 9:15 or 9:30.

I have no knowledge of the notifying of the F. B. I. agents. There were four or five agents there. They did

not spend a considerable portion of that day there. I do not know who the agents were.

I questioned Mr. Costello about the money. The agents did not question him about the money in my presence. I questioned him about it at Tower Grove and Blaine at about 7:05 in the morning at the time of the arrest. I did not ask him if it was Greenlease ransom money. After the showup Detective Boni and I questioned him about the murder of Robert L. Brown who was killed on January 24, 1956. We also questioned him about his whereabouts in the last month and what he did in Miami and who he went with, also who he stayed with in Miami. We tried to question him further but he refused to answer. I did not question him about the money and he was not questioned about it in my presence, other than at the scene of the arrest on Blaine and Tower Grove.

Cross-Examination, by Mr. Boecker.

I had had no communication with any Federal officer prior to making this pickup on Mr. Costello. There was no arrangement with any Federal officer for the pickup.

Redirect Examination, by Mr. Shenker.

I was ordered to pick up Mr. Costello by Captain John Doherty. The order was issued right after the Robert L. Brown murder and this was the first time that I had seen Costello after that.

We always take our prisoner's cars to the police garage for safekeeping. I did not stay with the car. Mr. Costello parked it in the garage and locked it and the keys were turned over by me to the garage attendant. We then went into the police station.

[fol. 17d] CAPTAIN JOHN DOHERTY testified as follows:

Direct Examination, by Mr. Shenker.

I was a lieutenant of the Police Department of the City of St. Louis on the 27th of February, 1956.

I was not present on the 27th of February when Mr. Costello was brought in. I arrived at the station at about

10:30 that morning and he was already there. The Federal Bureau of Investigation agents were already gone when I arrived, and I did not discuss the matter with them. At least they were not in my office when I arrived and I did not see them.

I had Mr. Costello brought up to our office and I talked to him.

Mr. Shenker: Q. * * * and your office works in cooperation with the Federal Bureau of Investigation?

Mr. Boecker: I will object to that as calling for a conclusion * * *.

The Court: Objection sustained to the question in its present form.

Mr. Shenker: Q. Your office has worked at the time on or about the 27th day of February, 1956, did work in cooperation with the Federal Bureau of Investigation?

Mr. Boecker: I object to that as immaterial unless it is limited to some pertinency to this matter before the Court.

Mr. Shenker: I don t know. I think that is a matter of common knowledge. I do not think we have to offer evidence.

The Court: I do not know that my information is common information. It may not be as complete as yours, Mr. Shenker. Objection sustained to the question in its present form.

Mr. Shenker: Q. Now, Captain Doherty, you and the Federal Bureau of Investigation, that if your office and the Federal Bureau of Investigation had considerable discussions or numerous discussions pertaining to Mr. Joseph Costello, isn't that right?

Mr. Boecker: I object to that as general in form, not limited to any pertinency in this case. * * * That is not shown to be material to this case. It is general in form not limited to the facts produced in the examination here of these witnesses.

The Court: Objection sustained.

Prior to February 27, 1956, Joe Costello's name was brought up on numerous occasions in conversations between

my office and the F. B. I. relative to the Greenlease ransom money. His name was brought up all along the line of [fol. 17e] trying to solve the disappearance of the Greenlease money, which was paid as a result of a kidnapping.

I have no personal knowledge of what F. B. I. agents were in the police station that morning.

Mr. Shenker: The record I presume may show that the kidnappers, the Greenlease which we are referring to, that the kidnappers of that Greenlease boy that they were convicted in Federal Court, isn't that so, the record may show that?

Mr. Boecker: The record may show that.

Cross-Examination, by Mr. Boecker.

I had ordered Detective Richters to pick up Joseph Costello for questioning in connection with the Robert L. Brown killing, which took place in St. Louis, Missouri.

Mr. Boecker: Q. So far as you are concerned you were dealing with crime under the laws of the State of Missouri in working on that murder case * * *.

Mr. Shenker: That is objected to on the ground it certainly invades the province of the Court and calls for speculation, conclusion and opinion on the part of this witness.

The Court: Sustained.

I am sworn to enforce the criminal laws of the State of Missouri.

Q. And the State of Missouri has laws——

The Court: I do not think it is necessary to take up time with that.

Mr. Boecker: Your Honor, I want to establish it is purely a State offense they are concerned with. I think it is important in this motion it was a State offense purely.

Mr. Shenker: If Your Honor please, I want to submit to the Court if that is the case I presume it is general knowledge it has not been solved. I presume it is general knowledge also that the F. B. I. has been working on that case the same as the State officials because they have never concluded whether it was strictly a State matter

and whether it dealt with racketeering and would also involve the Federal Statutes. The line of demarcation now is very close. * * *

[fol. 17f] Mr. Boecker: Q. Captain Doherty, with reference to the killing of Robert L. Brown, you are concerned with what you considered according to your instructions and your line of duty as a violation of State law, is that correct?

Mr. Shenker: That is what I am objecting to, if the Court please.

The Court: I suspect that.

Mr. Shenker: Because that certainly calls for a conclusion and opinion on the part of this witness and it invades the province of the Court, the question as to whether there was an improper search as far as this matter is concerned.

The Court: Well, he is a Captain of the Metropolitan Police Force of the City of St. Louis. I think we have a right to assume he was working in the line of his duty and trying to enforce and bringing to justice violators of the criminal law of the State of Missouri.

Mr. Shenker: Your Honor, his duty defined correctly is to enforce all laws of the State of Missouri and the City of St. Louis and Federal laws, that is the duty of every police officer.

Mr. Boecker: I am asking him specifically in this connection if he was concerned only with the State violation according to his instructions and his line of duty.

Mr. Shenker: I am going to object to that, if the Court please, for the reasons I have given.

The Court: Well, were you acting under definite instructions in this particular regard Captain?

The Witness: My own instructions.

The Court: He may answer.

A. The reason I had Joe Costello picked up, I wanted to question him relative to the Bobby Brown murder.

Mr. Boecker: Q. And that was, I believe you said, on your own volition? A. That is right.

Redirect Examination, by Mr. Shenker.

When I issued the order for Joseph Costello's arrest I had no warrant for his arrest and I just issued the order as a superior police officer. On the 27th day of February, 1956, there was no warrant for Mr. Costello's arrest and there was no search warrant. The Bobby Brown killing which I referred to has not been solved as yet. There was no charge placed against Mr. Costello for the murder of Mr. Brown.

* * *

Mr. Hennelly: On the motion to dismiss and the motion to suppress with respect to Joseph Cannella, Mr. Cannella twice testified before the Grand Jury and was subsequently indicted by that same Grand Jury. In view of that fact we can enter into a stipulation with Mr. Boecker with respect to the circumstances surrounding that. It may be stipulated, as I understand, that he was called before the Grand Jury.

Mr. Boecker: The defendant, Joseph John Cannella, in this case was subpoenaed before the Grand Jury in this district and appeared and testified on April 18, 1956 and again on April 23, 1956, and I believe the defendants also are asking me to stipulate, and I do stipulate that on the occasion of his appearance as a witness before the Grand Jury on April 18th, there is no record that he received any warning against his self-incrimination.

The Court: Do you have a written record?

Mr. Boecker: We have a record.

The Court: Does it say he was warned?

Mr. Boecker: It shows he did not receive a warning.

The Court: Why not?

Mr. Boecker: There was no need to.

Mr. Hennelly: Our position is, Your Honor, that is the heart of the situation, that he was——

Mr. Boecker: Just a minute. A further stipulation: the record does show, may I ask leave to read such portion, that he was examined on his second appearance on the 23rd, may I read into this record the transcript of that portion of the Grand Jury proceedings?

The Court: Is there any objection?

Mr. Shenker: No, we would like to have it read.

The Court: Well, you may accommodate them, Mr. Boecker.

Mr. Boecker: Joseph Cannella, recalled, sworn and testified as follows—this being a portion of the transcript of the court reporter reporting proceedings before the Grand Jury on Monday, April 23, 1956, at the United States—proceedings on April 23, 1956 at the United States Court and Custom House, 1114 Market Street, St. Louis, Missouri. Joseph Cannella recalled, sworn and testified as follows: Direct examination by Mr. Boecker. Question: State your name, please. Answer: Joseph Cannella. Question: You are the same man who was sworn as a witness before this Grand Jury Wednesday of last week, are you? Answer: Yes, sir. Question: Mr. Cannella, I believe I should tell you that you are not required to make any statement here that might tend to incriminate you. Do you understand that? Answer: Yes, sir.

That is the only portion that I propose to read from the Grand Jury proceedings.

Mr. Shenker: And I presume that the stipulation may go, that the questioning of Mr. Cannella was about the subject matter and about the matters which are the subject of this indictment?

Mr. Boecker: The questioning related to the subject matter of this indictment on both occasions.

Mr. Shenker: On the 18th and on the 23rd?

Mr. Boecker: Yes, sir.

The Court: Very well.

[fol. 17g] PHILIP M. KING testified as follows:

I am a Special Agent for the Federal Bureau of Investigation, and I was so engaged on the 27th of February, 1956. I went to the Metropolitan Police Department of

the City of St. Louis in my official capacity on a certain day, but I am not sure if it was the 27th. I saw Mr. Costello there. Several agents from our office went with me that morning. We went at the direction of my superior, Mr. Milnes, Special Agent in Charge. I saw Mr. Costello in the Central District office. I did not interrogate Mr. Costello and he was not interrogated in my presence. I examined some money which was taken from Mr. Costello. The other agents also made an examination.

Cross-Examination, by Mr. Boecker.

I first learned that defendant Costello was in custody when Mr. Milnes called me on the morning in question and I then went over to police headquarters.

Mr. Shenker: I believe that is all the evidence we will offer in support of our motion, if the Court please.

Mr. Boecker: * * * Your Honor, I would like to produce evidence at this time with reference to the preparation of a proposed indictment with a view to connecting it up with other evidence, to show to the Court defendant Cannella was not a man under suspicion or investigation at the time of his appearance.

The plaintiff offered the following evidence:

FRANCES HOWELLS testified as follows:

Direct Examination, by Mr. Boecker.

I am a stenographer employed by the United States Attorney's Office, Department of Justice, and I was so employed during April of this year.

Government's Exhibit 1 is work that I prepared as a stenographer. It is a transcript of some dictation given to me by Mr. Boecker on April 17. The caption is United States of America, Plaintiff, vs. Joseph Costello, a/k/a George Costello, Defendant.

Mr. Boecker: I would like to offer Exhibit 1 at this time to show that on that occasion, I expect to connect it up,

that there was an indictment proposed joining only the defendant Costello without any reference to defendant Cannella, who claims he was a man under suspicion.

Mr. Hennelly: Your Honor, we object, first to the reason it is hearsay, a self-serving instrument, that it won't tend to prove or disprove any issue in the case. It is vague, indefinite, a speculative instrument.

The Court: Overruled.

[fol. 17h] ELSIE KNAPP testified as follows:

Direct Examination, by Mr. Boecker.

I am an administrative clerk in the U. S. Attorney's Office. Government's Exhibit 2 is a praecipe for capias. This is the type of paper which is sometimes prepared in the course of operations in the office in which I am employed. I prepared these particular papers and I also prepared the certificate which is Government's Exhibit 3. Government's Exhibits 2 and 3 are related to the indictment evidenced by Government's Exhibit 1. Government's Exhibits 2 and 3 were prepared on April 20th.

Mr. Boecker: I would like at this time to offer Government's Exhibits 2 and 3 relative to the issue that defendant Cannella was not at that time under suspicion of proposed charges.

Mr. Hennelly: We will object to the same reasons, Your Honor, which I have heretofore stated.

The Court: Overruled.

Cross-Examination, by Mr. Hennelly.

I recall preparing these matters since Mr. Boecker refreshed my memory in July of this year. I seriously doubt that these matters were prepared by me on the 23rd of April.

[fol. 17i] Plaintiff's Exhibit 1 on Motion to Suppress.

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
v.
No. .....
Joseph Costello, a/k/a George Costello,
Defendant.

The Grand Jury charges:

That on or about December 22, 1955, within the Eastern Division of the Eastern Judicial District of Missouri, the defendant,

Joseph Costello, a/k/a
George Costello

having been convicted of a crime of violence, to wit, the crime of burglary, in the Circuit Court of St. Francois County, Missouri, did unlawfully ship and transport and cause to be shipped and transported in interstate commerce, from Granite City, Illinois, to St. Louis, Missouri, a firearm, to wit, one Smith & Wesson .38 caliber "Chief Special" revolver, bearing the manufacturer's serial No. 688897.

In violation of Section 902 (e), Title 15, United States Code.

Second Count.

The Grand Jury further charges:

That on or about December 22, 1955, in the City of St. Louis, within the Eastern Division of the Eastern Judicial District of Missouri, the defendant,

Joseph Costello, a/k/a
George Costello

[fol. 17j] having been convicted of a crime of violence, to wit, the crime of burglary, in the Circuit Court of St.

Francois County, Missouri, did receive a firearm, to wit, one Smith & Wesson .38 caliber "Chief Special" revolver, bearing the manufacturer's serial No. 68897, which had been shipped and transported in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, and defendant did have the same in his possession at the time and place aforesaid.

In violation of Section 902 (f), Title 15, United States Code.

A True Bill.

.....

Foreman.

.....

United States Attorney.

[fol. 17k] Plaintiff's Exhibit 2 on Motion to Suppress.

Praecipe for Capias.

In the District Court, United States, Eastern District of Missouri.

The United States

vs.

Joseph Costello, a/k/a George Costello

The Clerk of said Court will issue capias, an indictment against the above-named defendant having been exhibited and filed in the above-entitled cause on the 23rd day of April, 1956.

This 23rd day of April, 1956.

.....

Assistant U. S. Attorney.

Bond $.....

(Federal Firearms Act)

[fol. 17l] Plaintiff's Exhibit 3 on Motion to Suppress.

District Court of the United States,
Eastern District of Missouri,
Eastern Division.

United States of America
v.
Joseph Costello, a/k/a George Costello
} No. ....., CR.

I, the undersigned, foreman of the grand jury of this court, at the session held at St. Louis, Mo., on the 23rd day of April, A. D. 1956, in pursuance of an Act of Congress approved April 30, 1934, do herewith file with the clerk of the court a record of the number of grand jurors concurring in the finding of the indictment in the above case, this record not to be made public except on order of the court, to wit:

..... grand jurors concurring.

.....
Foreman.

[fol. 17m] FORREST BOECKER testified as follows:

Mr. Boecker: May I proceed without interrogation and give my statement in narrative form?

I am an Assistant United States Attorney in the Eastern District of Missouri. For further identification I would like to refer to Government's Exhibit 1 and identify it as the original of an indictment which I had dictated to the previous witness, Miss Howells, with a view to submitting the same to the Grand Jury on some day convenient to them for their consideration, and in the indictment the only defendant named is defendant Joseph Costello, and I would like to further testify that I was an Assistant United States Attorney examining witnesses before the Grand Jury in this district on April 18th and put questions to one Joseph John Cannella, who is now a defendant in this case, and at the time I did not question him as a

prospective defendant or have in mind that he was implicated in the proposed charges.

Mr. Hennelly: May I ask that that last section be stricken for the reason that that is a self-serving statement since Mr. Boecker is a government witness and is testifying in direct examination as true; and he states now a legal conclusion and a statement of mind of which [fol. 17n] is not binding upon the defendant, which is an invasion of the province of the Court. I will ask that that section of his answer with respect to the fact he was not questioning him as a prospective defendant and that he did not intend that he be a defendant be stricken as a conclusion on his part, Your Honor.

The Court: Would you like to be heard as counsel or as a witness?

Mr. Boecker: As counsel, if the Court please.

The Court: Very well.

Mr. Boecker: Your Honor, I know it is a matter to be approached with great caution when an attorney submits himself as a witness in his own case. I submitted my own testimony for the reason that recent cases have mentioned this consideration with regard to passing upon the propriety of presenting an indictment against one who has been a witness before the same Grand Jury, and with particular reference to the recent case of United States v. Scully, Second Circuit, coming up in, I think 225 Fed. 2d 113. The holding was that there was no impropriety in calling a witness before a Grand Jury and in examining that witness without any warning as to his constitutional privilege, and further no error in any later indictment brought against that witness so long as the government did not act with fraud or deceit toward that witness, and I think the only way to show that is to place myself as a witness and be subject to cross-examination.

The Court: I will hear you. You are subject to cross-examination.

Mr. Boecker: To state the position, it was the view of the government at that time the particular witness was not an object of suspicion or a defendant. * * *

Cross-Examination, by Mr. Hennelly.

Mr. Cannella first testified before the Grand Jury on April 18th and I would estimate that he testified for an hour or a little bit less. I do not recall any conversations with him after he came out of the Grand Jury room. He was then called to appear before the Grand Jury on April 23rd. The indictment evidenced by Government's Exhibit 1 was prepared by me on either April 17 or 18. I cannot recall whether it was before or after Mr. Cannella appeared before the Grand Jury. My best judgment would be that it would have been before since we usually have a tentative indictment drawn before calling witnesses where we contemplate a specific charge. It is a fair statement to say that after I heard Mr. Cannella's testimony he was joined as a defendant.

Mr. Cannella was warned on April 23rd but he was not warned when he appeared on April 18th.

[fol. 170] Cross-Examination, by Mr. Shenker.

The general practice is that the witnesses are furnished by the agents.

Q. Mr. Shenker: * ** it may well be that the agents had in mind indicting Mr. Cannella even before the 18th but they did not communicate that to you at any time, isn't that correct?

A. Well, it is not my understanding the agents ever have in mind indicting any particular person or bringing any particular charge. We are supposed to be the lawyers.

Q. I know, but they come pretty much with definite ideas, don't they?

A. I would not say in that respect, no.

[fol. 18] (Order of District Court overruling Motions of Defendant, Joseph Costello, to dismiss Indictment.)

(Filed in U. S. District Court on December 11, 1956.)

The Court having before it the motion of defendant Joseph Costello to dismiss indictment, as well as the supplemental motion of said defendant Joseph Costello to dismiss indictment, and having examined said motions,

studied the briefs of the parties, and being fully advised in the premises, Doth Order that said motions and each of them be and the same are hereby overruled.

Dated this 11th day of Dec., 1956.

GEO. H. MOORE,
United States District Judge.

[fol. 19] (Order of District Court overruling Motion of Defendant, Joseph Costello, to suppress evidence.)

(Filed in U. S. District Court on December 11, 1956.)

The Court having before it the separate motion of defendant Joseph Costello to suppress evidence, and having examined said motion, heard the argument of counsel, and being fully advised in the premises, Doth Order that said motion be and the same is hereby overruled.

Dated this 11th day of Dec., 1956.

GEO. H. MOORE,
United States District Judge.

[fol. 20] (Order of District Court overruling Motions of Defendant, Joseph John Cannella, to dismiss Indictment.)

(Filed in U. S. District Court on December 11, 1956.)

The Court having before it the motion of defendant Joseph John Cannella to dismiss indictment, as well as the supplemental motion of said defendant Joseph John Cannella to dismiss indictment, and having examined said motions, studied the briefs of the parties, and being fully advised in the premises, Doth Order that said motions and each of them be and the same are hereby overruled.

Dated this 11th day of Dec., 1956.

GEO. H. MOORE,
United States District Judge.

[fol. 21] (Order of District Court overruling Motion of Defendant, Joseph John Cannella, to suppress Evidence.)

(Filed in U. S. District Court on December 11, 1956.)

The Court having before it the separate motion of Joseph John Cannella, one of the defendants in the above-entitled cause, to suppress evidence, and having examined said motion, heard the argument of counsel, and being fully advised in the premises, Doth Order that said motion be and the same is hereby overruled.

Dated this 11th day of Dec., 1956.

GEO. H. MOORE,
United States District Judge.

[fol. 22] (Order of District Court overruling Motion of Defendant, Joseph John Cannella, to inspect Grand Jury Minutes.)

(Filed in U. S. District Court on December 11, 1956.)

The Court having before it the separate motion of defendant Joseph John Cannella to inspect Grand Jury minutes, and having examined said motion, studied the briefs of the parties, and being fully advised in the premises, Doth Order that said motion be and the same is hereby overruled.

Dated this 11th day of Dec., 1956.

GEO. H. MOORE,
United States District Judge.

[fol. 23] Renewed Motion of Defendant Joseph Costello to Suppress Evidence.

(Filed in U. S. District Court on April 2, 1957.)

Defendant, Joseph Costello, aggrieved by an unlawful search and seizure on February 27, 1956 made by police

officers of the City of St. Louis of his automobile from which the officers will testify in this case that they seized the revolvers mentioned in the indictment in a search conducted outside his presence, moves the Court to suppress as evidence against him any and all articles taken by means of such search and seizure and any evidence gained directly or indirectly as a result of such search and seizure. The grounds for this motion are as follows:

(1) Subsequent to the hearing in this Court on defendant's original motion to suppress evidence, the Circuit Court of the City of St. Louis on February 1, 1957 in Cause No. 300E entitled State of Missouri v. Joseph Costello, under an indictment which charged that defendant on February 27, 1956 carried concealed upon or about his person a revolving pistol, Smith and Wesson, .38 caliber Special, sustained defendant's motion to suppress evidence which motion involved the same arrest, search and seizure objected to in the instant motion.

[fol. 24] (2) The search and seizure were made without warrant and without authority.

(3) The defendant did not violate any law in the presence of the peace officers.

(4) The peace officers arrested the defendant without both reasonable cause and probable cause that he had violated any law.

(5) The search and seizure were not made incident to any arrest.

(6) The search and seizure were unreasonable and violative of Article I, Section 15 of the Missouri Constitution and compelled defendant to give testimony against himself in violation of Article I, Section 19 of the Missouri Constitution and therefore violated the due process clause of Amendment 14 of the United States Constitution.

(7) The grounds heretofore enumerated make such search and seizure unreasonable and violative of the provision against unreasonable searches and seizures of Amendment 4 of the United States Constitution.

(8) The grounds heretofore enumerated compel the defendant to give testimony against himself in violation of

the self-incrimination provisions of Amendment 5 of the United States Constitution.

MORRIS A. SHENKER,
Attorney for Defendant
Joseph Costello.

[fol. 25] (Transcript of Proceeding on April 8, 1957, on Renewed Motion to Suppress Evidence).

Mr. Shenker: There is still a motion which was filed last week of which we have more formal evidence rather than testimony, which will require only a few minutes, that is about all.

The Court: What is the motion?

Mr. Shenker: The motion, if the Court please, is a second motion to suppress the evidence and which is predicated on the order which was made in the State court, Your Honor, against Mr. Costello, and it relates primarily only to Mr. Costello.

Mr. London: However the defendant Cannella would like to join in the same motion, Your Honor.

The Court: Very well.

Mr. Shenker: And when the Court gets to it, it will require just a few minutes to present it to the Court.

The Court: Very well.

(The Court then proceeded to call its docket, after which the following occurred:)

The Court: Now, on the Costello and Cannella case, what about it? This is a renewed motion.

Mr. London: That is right, Your Honor.

The Court: On behalf of Defendant Costello. Hasn't there been a similar motion to this filed before?

Mr. Shenker: There was originally a motion filed to suppress the evidence which was heard but at that time the State matter had not been ruled upon.

The Court: The State had not what?

Mr. Shenker: A matter in the motion to suppress in the the State Court had not been ruled upon. Now, we contend in view of the fact that we have one case which comes close to holding that, but is not exactly on all fours on it, which we contend, the State of Missouri, who made the arerst originally which is the subject of this indictment, and that since the court in the State charge had ruled that the arrest was unlawful and that it sustained a motion to suppress, that in view of that, that this court should consider that.

[fol. 25a] The Court: You do not think that is binding on this court in any way, do you?

Mr. Shenker: Not in that sense, Your Honor, it is not. I know that the Court does not follow the precedent that is set by the Circuit Court generally, of course not, but in view of the fact that if the search was unlawful that the court can take that into consideration in determining whether or not that evidence should be made available to the Federal Government.

The Court: That will be determined in this court, not by a ruling of the State court.

Mr. Shenker: That is correct, but in order to make the record, Your Honor, we feel that it is our duty to call to the Court's attention the ruling that was made. * * * In the State court in connection with that.

The Court: Certainly. It is perfectly proper.

Mr. Shenker: In support of that I should like to have this identified and marked as an exhibit. This consists of the indictment in the State court, of the two motions to suppress that were filed in the State court and of the court memorandum sustaining the defendant's motion to dismiss, rather to suppress and ordering the evidence suppressed.

The Court: The State court filed a written memorandum?

Mr. Shenker: Yes, sir. We filed a written memorandum. I have all these authenticated and showed them to Mr. Boecker, and we are offering this in evidence, if I may have it identified.

The Court: Is there any objection?

Mr. Boecker: I believe not. I think Your Honor would like to have an opportunity to examine this record, but I do not submit the law is contrary to Mr. Shenker's position, it would have no binding effect on this court.

(The document referred to was marked Defendant's Exhibit 1.)

Mr. Shenker: I would like to offer into evidence, if the Court please, Defend nt's Exhibit 1 of 4-8-57, which consists of the indictment in the State court; the motion to [fol. 25b] suppress the evidence, that was filed on May 15, 1956, by the defendant Costello; and the motion to suppress the evidence that was filed by the defendant Costello on November 19, 1956, and the decision and order of the court, Judge David A. McMullan, which was filed in court on the first of March, which was rendered and filed on the first of March, 1957; and I would also like the record to show, if the Court please, that the gun that is involved in this indictment is the same gun, is one of the guns which is the subject of the indictment in this case, and also that the arrest was made, which was held to have been an unlawful arrest by Judge McMullan on that order, and which was the subject of the State indictment, it was also the same arrest which was the subject of the indictment in this case which we are now trying. The gun is the gun which is involved in the third count of this indictment, but actually that the arrest, I mean that the entire indictment is the result of, that is the entire indictment in this case which we are trying now, is the result of the arrest which was made in February, which was the result of the indictment in the State court.

Mr. Boecker: I am sure if Mr. Shenker so certifies, that the record may show that.

The Court: Very well.

Mr. Shenker: One other point, Your Honor, we would also like to reintroduce and also let the record show we are re-offering all of the evidence which we have heretofore offered in support of the first motion to suppress, we are offering it also in support of this motion to suppress.

The Court: There is no objection to that either, is there?

Mr. Boecker: No objection.

Mr. London: We request, Your Honor, this all may go to defendant Cannella as well as Costello.

The Court: That may.

[fol. 26a] (Defendants' Exhibit 1, consisting of four documents.)

State of Missouri, } ss.
City of St. Louis }

Circuit Court, City of St. Louis, February Term, 1956.

The Grand Jurors of the State of Missouri, within and for the body of the City of St. Louis, now here in Court, duly impaneled, sworn and charged, upon their oath present, That Joseph Costello on the 27th day of February, one thousand nine hundred and fifty-six, at the City of St. Louis aforesaid, did unlawfully and feloniously carry concealed upon and about his person a certain deadly and dangerous weapon, to-wit: a revolving pistol, Smith and Wesson, .38 Caliber Special, loaded with gunpowder and five metal bullets: contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

EUGENE P. FREEMAN,
Assistant Circuit Attorney.

[fol. 26b]

No. 300-E

Circuit Court, City of St. Louis

February Term, 1956

State of Missouri

vs.

Joseph Costello

Charge: Carrying Concealed Weapon

Witnesses

Det. Robert Richters, SSB.
Det. Edward Boni, "
Det. Cpl. Gerald Sullivan
James C. Davis, * * *

A True Bill.

WALTER A. STAY,
Foreman.

Filed 3-6, 1956

James H. McAteer,
Clerk of the Circuit Court, City of St. Louis
(for Criminal Causes).

[fol. 26c]

Court Memorandum.

In the Circuit Court of the City of St. Louis,
State of Missouri.

The State of Missouri
vs.
Joseph Costello,
Defendant.

Cause No. 300-E
Div. No. 10

The Constitution of the United States, as well as the Constitution of the State of Missouri, protects everyone against unreasonable searches and seizures. Whether or not a search is reasonable is a judicial question.

The rule almost universally followed by our Supreme Court and the federal courts and the State appellate courts is in general that private property possessing evi-

dential value only, obtained by governmental officers by means of illegal search are not admissible in evidence against a person affected. The rule applies whether the evidence is procured by compelling the defendant to produce evidence against himself or whether it is discovered by means of an illegal search.

It is further the rule of law that even though an officer may not have a warrant for an arrest, or for search and seizure, he may make a search if the same is made contemporaneously with and as incident to a lawful arrest.

There is no evidence in this record before this court that the defendant had committed a misdemeanor either in the officers' presence or otherwise, or that there was any reasonable ground to believe that the defendant had committed an offense against the law at the time of his arrest.

The evidence shows that the defendant was taken into custody "on suspicion" "for investigation" "suspected of having knowledge of a murder" "for questioning." Lieutenant Colonel Chapman frankly stated that he had given instructions to "pick him up for questioning about the Bobby Brown Murder," "that the defendant might [fol. 26d] have something to do with it," "that we had no information connecting him with the murder," but "we wanted him in for questioning because he might know something." The order was issued two to three weeks before the arrest. It was obviously given because the police thought that perhaps the defendant may be able to tell them something that would aid the police in their intensive investigation.

Our Supreme Court has stated: "We see no distinction between personal property which the defendant may have left in his home and personal property he may have left in his automobile."

State v. Cuezze, 249 Southwestern 2d 337, l. c. 376. If the Court sanctioned a rule permitting an officer to search any person any place and to stop citizens and search their cars without warrant or knowledge and would encourage arrests and seizures because he suspects someone might know something about a crime, and if the officer is rewarded according to his success in a discovery

and encouraged to search on a chance of hitting upon something suspicious, a system of police rule would follow characteristic of those countries where respect for the rights and inviolability of the person is unknown.

The Court is not to be construed in any way criticizing the conduct of the officers in this case. They have testified in the Court's opinion frankly and honestly.

It is also very doubtful that the search was incident to and contemporaneous with the arrest, but since the arrest was in the first instance unlawful, that point need not be decided. The motion to quash and to suppress the evidence must be sustained, and it is so ordered.

DAVID A. McMULLAN,
Judge—Division No. 10.

Filed, 2/1/57.

[fol. 26e] Motion to Suppress Evidence.

State of Missouri }
City of St. Louis } ss.

In the Circuit Court of the City of St. Louis,
State of Missouri.

State of Missouri, Plaintiff,
v.
Joseph Costello, Defendant.
} Cause No.

Defendant, Joseph Costello, states:

a. That on the 27th day of February, 1956, while he was riding in his automobile, he was arrested by Detective Robert Richters and his riding partner at Tower Grove and Blaine Avenues in the City of St. Louis.

b. That he was taken to Police Headquarters by these officers.

c. That his automobile was placed in the police garage.

d. While defendant was being detained at Police Headquarters, Detective Sergeant Gerald Sullivan and other

peace officers obtained defendant's automobile keys from the garage attendant.

e. Sergeant Sullivan and these other police officers unlocked the glove compartment and trunk of defendant's automobile with these keys.

f. Sergeant Sullivan and other police officers are prepared to testify that they found a revolver bearing serial No. 65965 and a revolver bearing serial No. 68897 in the glove compartment of defendant's automobile.

g. The State intends to introduce these two revolvers into evidence.

Defendant, Joseph Costello, aggrieved by this unlawful search by police officers moves this Court to suppress as evidence the items mentioned in the above paragraphs of [fol. 26f] this motion and any other evidence obtained as a result of this unlawful search and as grounds for this motion states:

1. The search and seizure were made without warrant and without authority.

2. The defendant did not violate any law in the presence of the peace officers.

3. The peace officers arrested the defendant without both reasonable cause and probable cause that he had violated any law.

4. The search was not made incident to an arrest.

5. The grounds heretofore enumerated make such search and seizure unreasonable and violative of Article I, Section 15 of the Missouri Constitution and violative of the due process clause of Amendment 14 of the United States Constitution.

6. The grounds heretofore enumerated compel the defendant to give testimony against himself in violation of Article I, Section 19 of the Missouri Constitution and in violation of the due process clause of Amendment 14 of the United States Constitution.

MORRIS A. SHENKER,
Attorney for Defendant.

Filed 11/19/56

[fol. 26g] Motion to Suppress Evidence.

State of Missouri }
City of St. Louis } ss

In the Circuit Court of the City of St. Louis,
State of Missouri.

State of Missouri, Plaintiff,
v.
Joseph Costello, Defendant.
} Cause No.

Defendant is charged herein with the offense of carrying a concealed weapon. It is the State's contention that police officers seized two guns by virtue of a search of defendant's automobile which search was not made in defendant's presence. Defendant moves the Court to suppress as evidence against him any and all articles allegedly taken by means of such search and any evidence allegedly gained by means of such search. The grounds for this motion are as follows:

1. The search and seizure were made without warrant and without authority.

2. The defendant did not violate any law in the presence of the peace officers.

3. The peace officers arrested the defendant without both reasonable cause and probable cause that he had violated any law.

4. The search and seizure were not made incident to an arrest.

5. The grounds heretofore enumerated make such search and seizure unreasonable and violative of Article I, Section 15 of the Missouri Constitution and violative of the due process clause of Amendment 14 of the United States Constitution.

[fol. 26h] 6. The grounds heretofore enumerated compel the defendant to give testimony against himself in violation of Article I, Section 19 of the Missouri Constitution

and in violation of the due process clause of Amendment 14 of the United States Constitution.

MORRIS SHENKER,
Attorney for Defendant.

Filed May 15, 1956.

Mr. Boecker: I submit, Your Honor, this adds nothing to the record which has already been considered by this court, assuming for the sake of argument that there was an illegal arrest by the State officers, I do not need to cite to Your Honor a long list of authorities which holds in this jurisdiction, so long as there has been no collusion, and the record shows that there was no collusion.

[fol. 26i] The Court: You say the record in that case shows that there was collusion?

Mr. Boecker: I submit that was an unfair inference given by the city police officers who were here in the case of the first argument, that they were acting in their own province.

The Court: That came before me and I ruled?

Mr. Boecker: That is right. It was ruled on by Your Honor. You will recall that Captain Doherty, and I think one or two other police officers testified, and the point was developed on the occasion of this arrest and search that they were acting wholly within the province of their own, as city police officers.

The Court: It is difficult to keep all the details in mind.

Mr. Boecker: There was no evidence whatsoever of any concert of action between the city police and the Federal authorities.

The Court: That was my recollection. Is there anything you brought up that is new?

Mr. Shenker: The only thing is, as I said, Your Honor, the basic things in the motion are the same with the exception that we lay this proposition before the court, but at that time there had been no State adjudication that the arrest was unlawful, and it was an improper arrest. Since that time, when we argued the motion in Your Honor's

court, there was an adjudication that the arrest was unlawful, and that is the reason that we are calling it to the Court's attention.

I want to point out this, that generally speaking when two bodies acting independently, then one is not bound by the other, and while the evidence here is close, it appears from the evidence that was offered that the arrest was made, and then the FBI agents were called and notified, and they came over some half hour or forty-five minutes later to the police station. All the evidence shows the FBI agents were not present with the police officers when the arrest was made. However, we seem to think that the latest decisions on the point indicated that where there is an adjudication, that is they indicate that, Your Honor, there has been an adjudication of an improper conduct or improper arrest I should put it, improper arrest by a police officer and that the evidence was ordered suppressed, that the fruits of that arrest should not be made available in a prosecution in the Federal court, and vice [fol. 26j] versa, that all of the officials were not present, that is the representatives from each government were not present at the time the arrest was made.

I want to point out to Your Honor one of the cases, which I believe we called to the Court's attention at that time but, of course, it was probably, it could not have been as forcibly called to the Court's attention at that time because at that time the State court had not ruled on that particular point, and that is the case of Rea v. U. S., that is 350 U. S. 214, where the United States Supreme Court held that a Federal narcotics agent could be enjoined from testifying in a State court prosecution in connection with the narcotics obtained. In other words, it is a different twist to the situation where a Federal narcotics agent raided a person, Rea, and he obtained some evidence but it could not be used in Federal Court because they held the evidence was improperly obtained by him. Then he sought to testify in the State prosecution for the same thing. He was enjoined, and the United States Supreme Court approved that he was enjoined from testifying there.

The Court: What is that citation?

Mr. Shenker: That is 350 U. S. 214. In other words, it is a very recent case and it gives it a little different twist.

We say if you follow that logic, if you take that rule and follow it, the same thing would apply here. If it applies one way it certainly would apply the other way, and that is the closest case we have on the point, and we think it governs.

The Court: I will look at the case.

Mr. Shenker: In other words, they establish the rule in that case that if evidence is obtained by virtue of improper search by a Federal Officer that that evidence, that officer can be enjoined from testifying in a State prosecution. Now, the reverse, of course, ought to be true also.

The Court: I don't follow that reason. Do you, Mr. Boecker?

Mr. Boecker: No, Your Honor, I do not. The defendant in that case would derive his rights and immunities in the State court from the provisions of the constitution of whatever State was involved there. He derives his rights [fol. 26k] and immunities in this court under the United States.

I think there are two grounds involved, one, the officer involved, and a different jurisdiction, different constitution involved.

Mr. Shenker: It is the same thing, though. You have State and Federal.

Mr. Boecker: There is no charge here the United States officer was acting in an improper way. You did not charge the Federal officers with any improper conduct.

Mr. Shenker: Not in this instance we do not. They were not present at the arrest. We cannot say that they made the arrest. They did not.

The Court: The motion of the defendant, Joseph Costello, to suppress evidence is overruled.

Mr. Shenker: May the record show, Your Honor, one more thing then on this, on the indictment which was the subject of a State case, where the evidence was ordered suppressed, the gun that was involved was a .38 caliber Chief Special revolver bearing Serial Number 68897, the record may show, if the Court please, the same gun and

Serial Numbers the subject of Counts One, Three and Four of the indictment.

Mr. Boecker: He is correct as to the number, Your Honor.

Mr. Shenker: Thank you.

Mr. London: Your Honor, the same ruling would apply as to defendant Cannella?

The Court: The same ruling will apply in the case of defendant Cannella.

[fol. 27a] (Transcrip. of Trial Proceedings.)

(At the trial of this cause commencing on April 8, 1957, the following proceedings were held. A jury was empaneled to try the case. The Government made the following opening statement to the jury:)

The Court: Mr. Boecker, you may proceed.

Mr. Boecker: Thank you, Your Honor.

At this time I would like to take the opportunity, gentlemen, of outlining the evidence which we expect to produce in support of the charges in this case, and so that you may be able to follow the narrative which I am about to give you, let me state more exactly the dates and places which are referred to in this indictment that I mentioned earlier in the proceeding here.

The first count, you will recall, involves both defendants, charges that on or about December 22, 1955, they caused to be shipped and transported in interstate commerce, that is from Granite City, Illinois, to St. Louis, Missouri, one Smith & Wesson .38 caliber Chief Special revolver, Serial No: 68897, the defendant, Costello, having prior thereto been convicted of a crime of violence, that is the crime of burglary, in the Circuit Court of St. Francois County, Missouri, that charge brought pursuant to a section of the United States Statutes which makes it a violation of Federal law for a person having been convicted of the crime of burglary, among other things, to cause to be transported in interstate commerce firearms.

[fol. 27b] Mr. Shenker: May I stop you; you said "among other things". Is the inference that Mr. Costello was convicted of other things?

Mr. Boecker: No, no. The statute provides other things that do not relate to this case, Mr. Shenker.

Mr. Shenker: That had nothing to do with Mr. Costello.

* * *

Mr. Boecker: And the charge also incorporates reference to a statute which holds anyone who aids, abets, counsels, procures or assists in the commission of a crime equally guilty with the principal in the crime.

Now, in the second case, the charge is in similar terms as to dates and as to places, and joining both defendants and relating to the same statutory laws; in this case, however, referring to the transportation of one Smith & Wesson .38 caliber Chief Special revolver bearing serial number 65965.

The third count is brought pursuant to another section of the statutes which makes it a violation of the law for one having been convicted of the crime of burglary, to receive a gun which has been shipped in interstate commerce, and that charge is laid against defendant Costello only, again charging that he had been convicted of the crime of burglary, and that he received the gun which is identified by number and which is the same gun referred [fol. 27c] to in the first count.

The fourth count of the charge states that commencing on or about June first, 1955, and including dates up to the return of the indictment, that both defendants unlawfully conspired together and with other persons, whose names are not known, to commit offenses against the laws of the United States by transporting and shipping, and causing to be transported and shipped, in interstate commerce from Granite City to St. Louis, certain Smith & Wesson Chief Special revolvers, and by having defendant Costello receive a firearm of the aforesaid description as having been shipped, and stating that the defendant, Costello, had this prior conviction, which is an element of the offense, which was the object of the conspiracy charge there. And the conspiracy count charges that pursuant to that conspiracy certain overt acts were committed, listing that on or

about December 22, the defendant, Cannella, obtained certain Smith & Wesson .38 caliber Chief Special revolvers, bearing the serial numbers referred to above, from one Earl Lewis in Granite City. That charge is stated pursuant to a statute which makes certain conspiracy, that is conspiracy to violate the laws, itself a crime.

The evidence which will be furnished pursuant to these charges will be first, to show that the defendant, Joseph [fol. 27d] Costello, was in the year 1936, in St. Francois County, Missouri, convicted of the crime of burglary; that he is the same person who was then known as George Costello, who is the defendant in this case and now known as Joseph Costello.

The evidence will further show that sometime thereafter, in 1954, the defendant, Costello, went to one of the witnesses, who will be called, one Harry Arnold, and told this witness that he was interested in obtaining firearms. Harry Arnold at that time had a license to deal in firearms but stated to Mr. Costello that he was not in position to accommodate him, and suggested he might like to approach one Earl Lewis, who was a dealer in firearms, in Granite City, Illinois.

The evidence will further show that, by the testimony of Earl Lewis, that he recollects two or three occasions—now, I am saying two or three because the witness will testify here himself and I am only giving my best recollection of the reports that have been brought to my attention—on two or three occasions—I will limit it to two I anticipate will be mentioned in the evidence. On one occasion the defendant, Costello, was in the Earl Lewis Gun Shop and obtained a gun which had been ordered, not any of the guns in this case, but on an earlier occasion, [fol. 27e] had obtained some gun there. On another occasion the witness, as I recall, states he remembers the two defendants together, Costello and Canella, went in his gun shop in East St. Louis and were shown three guns which had been ordered by some person whom the dealer does not identify as placing the order, but the defendant Costello, and Cannella, were together there at that time, saw the three guns, and told him to get different styles and models of guns. On that occasion Mr. Lewis recollects that they arrived in a powder blue Cadillac; later—we are

up into the latter part of 1955 now—this same gun dealer in Granite City recalls that a powder blue Cadillac came to his place of business, and whoever was driving it did not get out but another person got out, came in, and got a catalogue of guns and took it out and came back and placed an order, and that pursuant to that order the three guns were obtained by Earl Lewis, which include the two that I have read to you as being mentioned in this indictment.

That pursuant to that order the dealer over there, Mr. Lewis, will tell you that he obtained three guns, all being of the same make and model number, that is Smith & Wesson .38 caliber Chief Special revolvers, and that when he got them, pursuant to instructions he received he called a phone number in St. Louis, and that 'phone number [fol. 27f] will be identified for you by other witnesses as being the phone number of the Ace Cab Company, and he will tell you that he was told to call there and leave the message for Joe, that what he ordered had arrived, and that when he got the three guns he called the number, which is the number of the Ace Cab Company, and left a message for Joe, what had been ordered had arrived, and that after that, the defendant, Cannella, came over and received delivery of the three guns which were ordered including the two which I have already mentioned to you as being charged in the indictment, and signed the name John Overbeck, as the recipient of the guns, and signed an address on Kingshighway Boulevard in the City of St. Louis, which will be shown to you by other evidence is a non-existent address, there is no such street number as the one that was given.

The evidence will further show that—we will trace each of these three guns—the evidence will show that the gun mentioned in the second count, was found in the possession of a gentleman by the name of Klaich, or Kletch, I do not know how he prefers the pronunciation. Mr. Klaich will testify that he was in the office of Joe Costello at the Ace Cab Company on one occasion in the winter of 1955, and in an open desk drawer, saw a revolver, [fol. 27g] and told Costello that he would like to get a gun like that for the protection of his premises, he being in the restaurant business, I believe, and asked Costello

if it were possible for him to get one. I am giving only the substance now, I am not attempting to quote what these witnesses are actually going to say word for word; I do not think anybody could. In substance, that is what he told Costello, and Costello said, "Well, these are hard to get". Mr. Klaich will tell you shortly thereafter the other defendant, Cannella, called on him and told him he understood he, Klaich, was interested in getting a gun and asking further particulars.

The evidence will further show after these guns were obtained through the gun shop in Granite City, one of the three, and the same gun incidently as is mentioned in Count Two of the indictment, was delivered to Mr. Klaich, that thereafter when it was explained to him that there was a charge of law violation he voluntarily surrendered the possession of that gun to Federal authorities, and it will be produced here.

Now, the gun mentioned in Counts One and Three as having been caused to be transported by both defendants, and having been received by defendant Costello, contrary to the law, the evidence as to that will be that on the occasion of an arrest of defendant Costello by the City [fol. 27h] Police in about, February 26th of last year, 1956, the following occurred: two arresting officers stopped Costello as he was driving his car. Now, since the episode involving the use of a powder blue Cadillac, which I mentioned to you as having been on the scene when they were over in Granite City back in 1955, Mr. Costello has received delivery of a different Cadillac, this one is a black one—on the occasion of being stopped by the police they asked him to be allowed to examine the car, and the glove compartment was locked, and Costello told them that he did not think that he had any key which would fit it, that it was his wife's car, he was not used to it, he did not know what keys were used for them, but that the compartments were locked. The evidence will further show those were falsehoods on the part of Costello. The car was his and regularly used by him, and one of many Cadillacs, and the only inference is, the man owned so many Cadillacs, there is no change in their system of furnishing two keys for the operation of the car, he did know what the keys were for, and one of the keys in his possession was

proved to be the key for the glove compartment, the inference is it was his, and he knew it. When they opened the glove compartment they found the guns mentioned in Counts One and Three of the indictment.

[fol. 27i] In order to trace that gun on that occasion it will be necessary to call several police officers, for this reason, two officers made the arrest and one or both of them will testify to the arrest and his statements on that occasion, and he turned the keys over to them. They in turn turned the keys over to the garage attendant at the St. Louis Police Garage, and it will be necessary to call him to trace the handling of the keys and make sure they are the same keys to the same car, and there was no approach to the car other than by these police who are here, and the attendant will then testify he turned the keys over to another police officer who then used the keys to open the compartment, and he will testify that it is the same keys that he received at the garage, and the same car which was being driven by Mr. Costello, and that therein he found the gun, which will be produced and offered here in evidence, and that is the gun which was obtained from Earl Lewis and which was mentioned in the indictment.

The police will also testify that on that occasion that gun had ammunition in it, the Costello gun. Mr. Lewis will state that at the time he delivered the guns he did not furnish any ammunition. The son of Joseph Cannella will testify that they had no such ammunition around the Cannella household, yet when the gun was found [fol. 27j] in Costello's car it had ammunition in it.

One of the witnesses who will be called will be a business man connected with the Cadillac Agency who I expect will tell you regarding the facts that he furnished several Cadillacs to Joseph Costello; that the system of supplying keys for the car has been the same on several consecutive models which have been owned by Costello, and that Costello is the man who took delivery of the car personally.

The third gun which was furnished by Mr. Lewis in his shop over in Granite City will be mentioned for the purpose of producing further facts which would indicate that the defendant, Costello, is the person who caused the guns to be transported. In that case the third gun was found to be in the possession of a man who is a close

personal friend of Joseph Costello, and one who is not a close personal friend of the other defendant, Cannella; and that gun also was turned over to the police and will be produced here and identified and offered in evidence, connecting it with the third of the three guns and connecting it with a close or a personal associate of defendant, Costello.

The evidence will further show that during the course of the investigation of this case Cannella was interviewed by the agents of the FBI, and that on first being approached. [fol. 27k] he told them that he, Cannella, had on the day prior to the arrest, had possession of the car and he drove it because that was the occasion of the marriage of a member of his family. In his presence one of the agents who interviewed him, Mr. Moss, called up the Recorder's Office to find out the date of this wedding that had been referred to, and then challenged Cannella with the fact that the wedding had not occurred at that time at all but had occurred some four months previous. Thereupon Mr. Cannella gave the agents of the FBI an entirely different story, and what he said to them will be offered as evidence against him as an admission on his part and not as evidence as to Costello, as to whom it would be hearsay. Cannella told the agents then that he had accompanied Costello over to the gun shop in Granite City, and that at the latter's request, that is at Costello's request, had placed the order for the guns and had obtained the guns and had turned them over to persons who were indicated to him by Costello, and had used money furnished to him by Costello or from Costello's office by Costello's bookkeeper, to pay for the guns.

At the conclusion of making that statement he appeared to become nervously ill, and made a statement to the effect that he was in great fear that if Costello ever heard what [fol. 27l] he had told the authorities that he did not know what would happen to him, and thereafter he was excused and obtained medical attention for a highly upset stomach.

Now, the fact that any person suspected of a crime lies about a known truth is in itself evidence of guilty knowledge or their part. That would be, in the case of Costello, that he did not know what the keys were for, and it was his wife's car, and he did not know what was in the glove compartment.

In the case of Cannella there will be some extensive testimony to show that the first of his two stories were false, first, by his own admission, and second, by evidence of the Recorder of the City of St. Louis, that the wedding that he alleged, to use the car for, was not actually held at that time, that his statement that he had used the car for other purposes and had gone out with his family, and had kept his son out of school on that occasion because they had not gotten the car back will prove to be false, because his son was in school on that occasion, and his statement that he had had the car just prior to Costello's arrest are shown to be false by other witnesses who will testify that in fact Costello himself had the car on the previous day, and that the inference is that Cannella was not the sole party responsible for that gun being in the glove compartment.

[fol. 27m] Gentlemen, if we prove the facts as I have outlined—oh, yes, and a court reporter will be produced who will state that on the occasion of defendant Cannella's appearance before the Grand Jury, that he was advised of his Constitutional rights against saying anything that would incriminate him, and in answer to certain questions he stated he knew from conversation and some general reputation that Costello had a criminal record.

Now, if we prove all the facts as I have outlined to you, gentlemen, by competent evidence received in this court of law, we will submit to you for your consideration a verdict of guilty as to each defendant on Counts One, Two and Four, and as to defendant Costello on Count Three of this charge, involving unlawful transportation and the receiving of guns so transported in interstate commerce, having caused to be done by a man convicted of a crime, aided and abetted by the other defendant, and also from the facts and inferences therefrom that they conspired to this end as charged in Count Four, and that these facts are shown to you by the standard of proof obtainable in these courts, that is beyond any reasonable doubt.

Thank you.

Mr. Boecker: I will call Mr. May.

Mr. Shenker: At this time, if the Court please, there is a motion I should like to direct to the Court. It is a

different motion in view of Mr. Boeck r's opening statement, there is a motion I should like to ect to the Court.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the [fol. 27n] following occurred:)

Mr. Shenker: Defendant Joseph Costello will now move the Court for a mistrial and ask that his case be severed from that of Mr. Cannella for the reason that, from the statements made by Mr. Boecker in the opening statement it indicates certain statements that were allegedly made by Mr. Cannella that the Government will introduce into evidence and which statements are not admissible as to Mr. Costello but which statements are so prejudical that it would be impossible for the defendant, Costello, to receive a fair and impartial trial in the hands of this jury, and this though the Court may instruct the jury that those statements allegedly made by Mr. Cannella are only binding on Cannella and are not to be considered as evidence against Mr. Costello, but in fact they are so strong and they are so damaging that it would be impossible for a jury to remove that from their mind, and the condition that is created by their admission, and to remove it from their mind, that those statements as given by Mr. Boecker places the defendant's character at issue, that the State that Mr. Cannella said that he does not know, that he was afraid what Mr. Costello would do, and they carry all the inferences reflecting on the defendant's character which is not at issue, and it would be impossible for the defendant to receive a fair trial under the circumstances.

Mr. Boecker: Your Honor, I took pains to point out in my statement that it would be admissible only as against defendant Cannella, and I took pains to point out it would be ruled hearsay as to the other defendant. I did everything necessary to protect the record.

The Court: What is the form of your motion?

Mr. Shenker: My motion is in the form that we should either get a mistrial now, and then get a severance, and that defendant Costello is entitled to be tried alone in view of those statements. I honestly don't believe that

there is a jury in the world could take prejudicial testimony of that nature which goes in because it is testimony by hearsay which they can't get in the record against the defendant, but also puts the defendant's character in issue. I am predicating it on the statement Mr. Boecker made, I do not see how a jury could conceivably say that none [fol. 270] of this will be used against Costello when in fact the testimony will say what Cannella said, and that the only reason that Cannella is not saying that on the witness stand is because he is afraid of Joe Costello.

Mr. Boecker: No, no, that tests the veracity of the statement on that occasion, I would say that the purpose of that part of the statement is that it tests the veracity of that particular portion of the defendant's statement.

Mr. Shenker: It is not a question what it does—it is a question what it does to you before a jury. I do not think the people should be tried together, if they have that kind of statement, and I can show you some authorities. That is a confession. Certainly the Judge ought to use great care, and great discretion in not granting a severance; we asked for a severance originally, but we could not offer this testimony because I did not know it was available. If that testimony is available I think we ought to be able, we ought to be entitled to get a severance.

Mr. Boecker: Your Honor, the jury heard it once from me, the sketch of the testimony. They will hear it again when offered, by reason of the objection and the Court's admonition, they will hear it. If Mr. Shenker offers the proper instruction at the end of the case I think they would be well warned.

Mr. Shenker: And each time that is repeated it just drives another nail into the coffin of the defendant Costello; each time it is repeated it emphasizes it over and over again, that that is the testimony.

Mr. London: I want to make a motion on behalf of defendant Cannella at this time, a motion also for mistrial, a motion for severance, on the grounds that from Mr. Boecker's opening statements there would be various acts and statements of defendant Costello introduced into this

case, which occurred prior to the time of the—statements and acts of defendant Costello which will be introduced prior to the time of the alleged inception of the conspiracy in this case and prior to the time in the substantive counts in which Mr. Cannella was supposed to have taken part. For example, the statement of Mr. Boecker as to Mr. Cos-
[fol. 27p] tello's arangements with Mr. Harry Arnold, and the various other statements along that same line would be introduced to the bias and prejudice of defendant Cannella inasmuch as these statements and acts took place prior to any allegation of Mr. Cannella's being included.

Mr. Boecker: The fourth count is the conspiracy count.

Mr. London: What I am stating, from Mr. Boecker's opening statement there will be evidence of acts which took place prior to the inception of the conspiracy, prior to the start of any conspiracy, just acts of defendant Costello which are going to be used against defendant Cannella.

Mr. Boecker: Well, it sets the stage. It is not an act in furtherance.

The Court: Very well. We will take a recess at this time until tomorrow at ten o'clock, and be prepared to have any authorities you want to submit at that time.

(The trial was then resumed before the jury, and the following occurred:)

The Court: (Addressing the jury) You have been sworn as jurors to try this case, and before we adjourn today I want to renew my caution to you not to discuss this case among yourselves, and don't let anyone talk to you about it; and should there be any newspaper articles appearing about this case I urge you earnestly not to read any such articles. I hope you will keep faith with your oath which you have taken here and obey the instructions of the court, and don't read any newspaper article which appears about this case. Once in a while newspapers get things a little bit mixed up, and you will hear the witnesses from the stand and you will determine this case on the evidence you hear from the witnesses that take the stand, and the

argument of counsel and the instructions of the court as to the law. Let this remain with you throughout the remaining recesses of this trial, don't discuss the case until you go to your jury room and the case is finally submitted to you for your consideration.

Announce an adjournment until tomorrow morning at ten o'clock.

[fol. 28] Motion of Defendant Joseph Costello for a Severance of Defendants.

(Filed in U. S. District Court on April 9, 1957.)

Comes now defendant Joseph Costello, at the completion of the plaintiff's opening statement to the jury, and moves the Court to grant him a severance from the other defendant charged herein, and to grant this defendant a separate trial, and for his grounds and reasons therefor states, as follows:

1. That during the plaintiff's opening statement to the jury, the Assistant United States Attorney stated to the jury that the plaintiff's evidence would show that during the investigation of this case, co-defendant Joseph Cannella was interviewed by agents of the Federal Bureau of Investigation, that during the course of such interview said Cannella told the government agents that he had accompanied Joseph Costello, this defendant, to a gun shop in Granite City, Illinois, that at Costello's request he placed an order for the guns, obtained the guns, delivered them to persons indicated by Costello, and used money furnished to him by Costello to pay for the guns.

2. That the plaintiff's attorney during said opening statement further told the jury the evidence would show that co-defendant Cannella, during his interrogation by federal agents, appeared to become nervously ill, and stated that he was in great fear that if Costello ever heard [fol. 29] what he (Cannella) had told the authorities, he did not know what would happen to him; that Cannella was thereafter excused and obtained medical attention for a highly upset stomach.

3. That it is obvious from the foregoing statements contained in plaintiff's opening statement that this de-

fendant is and will continue to be prejudiced by the joinder of defendants herein and by a joint trial of both defendants; that unless a severance of defendants be granted, it will be impossible for this defendant to obtain a fair and impartial hearing, that the said admissions alleged to have been made by the co-defendant Cannella are highly incriminating and prejudicial as to this defendant not only on the question of his guilt of the crime charged herein, but also for the further reason that said alleged admissions portray this defendant in the minds of the jurors as a ruthless and treacherous individual who would commit physical violence and injury on the person of said co-defendant by reason of said co-defendant having made said statements to the federal agents; that by reason thereof such statements, clearly inadmissible as to this defendant, could serve only to stir the passions and emotions of the jurors against this defendant and to prevent their consideration of this case in a fair, calm and dispassionate manner.

4. That the evidence of said alleged admissions by the co-defendant will be inadmissible as to this defendant; that notwithstanding the fact that this Court may limit the admission of such evidence to the co-defendant alone, and that this Court may instruct the jury that such evidence is to be considered by them only as to said co-defendant, nevertheless such evidence is of such a damaging and incriminating nature as to this defendant, that it is not within the realm of possibility for the jury to limit its consideration of the damaging effect of such statements to the co-defendant alone.

5. That the alleged admissions of the co-defendant, referred to in plaintiff's opening statement, were not known [fol. 30] to plaintiff or plaintiff's counsel, until the said opening statement was made in open Court during the trial herein.

6. That there are but two defendants charged herein, and that it would not be time-consuming, but rather it would be reasonable and practicable to accord the defendants separate trials, thereby insuring each of the defendants a fair and impartial trial.

Wherefore, defendant Joseph Costello moves the Court to grant a severance of defendants, and to grant him a separate trial on the issues herein.

MORRIS A. SHENKER,
Attorney for Defendant
Joseph Costello.

[fol. 31a] (Further hearing on Motion for mistrial and severance and oral order of Court ovrruling said motions.)

(Whereupon, at 4:30 o'clock p. m., an adjournment was taken until 10:00 o'clock the following morning, Tuesday, April 9, 1957.)

The Court: You may proceed with the case on trial.

Mr. Boecker: I will call Mr. May.

Mr. Shenker: If the Court please, in order to complete the record on the motion that we made yesterday.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. Shenker: In support of the defendant Costello's motion for mistrial and for a severance, the defendant also wants the record to show, and he is ready to offer evidence on it, that for the first time defendant Costello, or his lawyers, heard about any statement allegedly made by Cannella in line with the opening statement that was made by Mr. Boecker, or of any admissions made by Mr. Cannella, was during the opening statement of Mr. Boecker at the trial of this case, and that the defendant, Costello, or his counsel, had no knowledge of any such statement or of any similar statements alleged to be made by Mr. Cannella.

Do you want me to offer evidence on that, or do you agree?

Mr. Boecker: I do not call for any offer of evidence on that point. I submit even if the fact were proved it would have no bearing on the merits of the motion. I assume

that if Mr. Shenker, as an officer of the court, certifies it, that will be sufficient record.

Mr. Shenker: That is a fact, Your Honor, that I am ready to testify under oath on that matter, on the facts which I have given.

The Court: Have you completed your statement?

Mr. Shenker: That is correct.

Mr. London: I want to make an addition to the statement also as to the defendant Cannella. I would like the record to indicate that as additional grounds for the defendant's motion for a mistrial that the defendant asserts as grounds that the Government in its opening statement showed that evidence which would be offered would be statements of the defendant Cannella, and that in the same opening statement the Government then proceeded [fol. 31b] to show that such statements were untrue, and that the Government would offer evidence to show that they were untrue, thereby the Government is attempting to offer as part of its case in chief evidence to which the Government cannot attest, and evidence which the Government knows to be false.

Mr. Boecker: Well, evidence that the defendant has lied about a material fact in the case is always held admissible as pertinent to his guilty state of mind.

Mr. London: I would like to add, that also goes to the defendant's character in this case, and places it in issue prior to defendant's choosing to do so.

The Court: The motions of each defendant are overruled.

Mr. Shenker: If the Court please, can I have leave to file a written motion for severance?

The Court: You may have, Mr. Shenker.

Mr. Shenker: It will be considered as having been filed before.

The Court: Yes.

Mr. Shenker: Very well.

Mr. London: Your Honor, may we request the separation of witnesses in this case? I do that on the basis that

from Mr. Boecker's opening statement there is going to be some testimony about various admissions made by the parties, and I feel that in order to be able to properly cross-examine the persons who will testify as to those admissions that the witnesses should not be in the courtroom while the other witnesses are testifying.

The Court: I have done that very few times in a great many years. I do not know whether this is a case to depart from the usual practice.

Mr. Boecker: I submit counsel has shown no circumstances which would justify it.

The Court: I do not think in the last twenty years I have ever ordered the separation of witnesses over a couple times, two or three times.

Mr. Shenker: We have the situation in here that these witnesses allegedly, these agents supposedly, according to [fol. 31c] Mr. Boecker's opening statement, they will testify that they questioned Mr. Cannella and will testify to certain statements made by him, and from Mr. Boecker's statement it appears that they are not reduced to writing, and it is not a written statement, so it will depend on alleged oral testimony.

Mr. London: That is right.

The Court: Very well. I will sustain the motion. And Mr. Bailiff, I sustained a motion for the separation of witnesses kept out of the courtroom throughout this trial.

Mr. Boecker: Will that apply to agents who are assisting in the trial, who will also be called as witnesses, Mr. Moss, Mr. Porter?

The Court: Mr. Shenker, you do not expect the agents of the government to be included in that order, do you?

Mr. London: I do, Your Honor.

Mr. Shenker: They are a very pertinent part, because of the testimony—I would say one agent probably would not matter, if one of them—I believe there is a rule which permits one agent, if he is working in the investigation to help the Government along the line.

Mr. Boecker: There are two who have been very active in the investigation, we rely on.

The Court: Those two will be excepted from the order.

Mr. Shenker: They are the ones that will undoubtedly testify to the interrogation of Cannella.

Mr. London: Your Honor, this may be an unusual request, but if it is the ruling those two may stay, could the order be further that when either of those two witnesses testifies the other be excluded only during his testimony?

The Court: I have no objection to that.

Mr. Boecker: I believe that may be done.

The Court: That they are not excluded except either one of them is excluded when the other one testifies. See that that is properly explained to them. All the witnesses in the case except——

Mr. Boecker: That is Mr. Moss and Mr. Porter.

[fol. 32] Plaintiff offered the following evidence:

GEORGE DEWEY MAY testified as follows:

Direct Examination, by Mr. Boecker.

I live in Margona Village, 8200 West, St. Louis County. I am a Special Officer for the Missouri Pacific Railway. For approximately 26 years I was Deputy Sheriff of St. Francois County, Missouri. I held that position during the year 1936. In about the year 1936 there was in the Circuit Court of St. Francois County an individual by the name of George Costello, charged with burglary and larceny. He was convicted on two counts and sentenced to two years on the burglary and two years on the larceny to run consecutively. The defendant in this case, Joseph Costello, is the same individual who appeared in about 1936 in the Circuit Court of St. Francois County.

Cross-Examination, by Mr. Shenker.

Mr. Costello's conviction was in the February Term of Court 1936, but I do not recall the exact date of the con-

viction. I do not know of any other conviction of Mr. Costello since that date. Although Mr. Costello was charged with both burglary and larceny both charges arose out of a single transaction and there were not separate charges pending against him.

Cross-Examination, by Mr. London.

I do not know Joseph John Cannella.

Mr. Boecker: At this time I would like to offer in evidence Government's Exhibit 1, the certificate over the seal and signature of the Circuit Clerk of St. Francois County, and bearing the jurat attesting to his office as Clerk and the office of the judge so certifying.

The Court: Very well.

Mr. Boecker: I would like to read portions of it to the jury and into the record at this time, if the Court please.

The Court: Very well.

Mr. Boecker: The certificate over the signature of Jesse D. Stewart, Circuit Clerk, and bearing the official seal of the Circuit Court; it says, "Be it Remembered, That heretofore, to-wit: On the 29th day of February A. D., 1936, at the regular February Term of the Circuit Court, begun and held at the Court House in the City of Farmington, in the County and State aforesaid, before the Honorable Taylor Smith, Judge of the Twenty-seventh Judicial Cir-
[fol. 33] cuit of the State of Missouri, and Judge of this Court, the following among other proceedings were had, to-wit: The State of Missouri, No. 957, versus George Costello. Criminal Action. Sentence and Judgment. Now at this day comes the State, by her attorney, and also comes the Defendant herein, in person, in custody and in presence of his Attorney and Counsel, in open Court; whereupon said Defendant is informed by the Court that he having been found guilty of Burglary and Larceny as charged in the information, and being now asked by the Court if he had any legal cause to show why judgment should not be pronounced against him, according to law, and still failing to show such cause: It is therefore sentenced, ordered and adjudged by the Court, That the said Defendant George Costello having been found guilty as aforesaid, be confined in the Penitentiary of the State of Missouri for the

period of 2 years from the 15th day of February, 1936, and that the Sheriff of this County shall, without delay, remove and safely convey the said Defendant to the said Penitentiary, there to be kept, confined and treated in the manner directed by law, and the Warden of said Penitentiary is required to receive and safely keep him, the said Defendant, in the Penitentiary aforesaid until judgment and sentence of the Court herein be complied, or until the said Defendant shall be discharged by the due course of law.

Further attached are entries showing the verdict of the jury and the so-called jurat showing the Clerk who certified to it is in fact the Clerk of the Court.

Mr. Shenker: I move at this time, if the Court please, to strike this from the record on the ground it is totally incompetent, irrelevant and immaterial, not as far as the authentication is concerned, I am not questioning that this is the document from the court, I am only objecting to its competency on the ground it is entirely too remote and improper and irrelevant.

The Court: Why so?

Mr. Shenker: Well, this relates to a situation, if the Court please, in 1936, that is some twenty-one years ago.

Mr. Boecker: May I suggest that argument be made out of the hearing of the jury, Your Honor? It is obviously a jury argument.

Mr. Shenker: I was only answering the Court's question.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. Shenker: This relates to an alleged conviction [fol. 34] on the 29th day of February, 1936. It is remote as to time, so far as this offense is concerned, and certainly was not contemplated by this statute at any time that a person who had previously been convicted of burglary or larceny, after the lapse of time, for such a long period of time, that it would still be subject to an accusation and a charge under this statute, that that period

after a certain length of time, there is a presumption in the absence of some evidence by the Government, that that person has reformed.

The Court: Can you show me any authority for that? Is there any statute, any court decision?

Mr. Shenker: I can show you some state laws.

Mr. Boecker: It is not limited as to time.

Mr. Shenker: I can show you some law on state charges, it becomes discretionary with the court.

The Court: Can you show me any federal authority?

Mr. Shenker: Offhand I do not know of any.

The Court: Objection overruled. Proceed.

Mr. London: To clarify the record for future proceedings, Your Honor, may the objections of one counsel be taken as for both unless specified in a different way?

Mr. Boecker: I will so stipulate.

MRS. EVELYN WEIR testified as follows:

Direct Examination, by Mr. Boecker.

I am employed as a Court Reporter. On April 23, 1956, I recorded the proceedings before the Grand Jury in the Federal Building of St. Louis. Pursuant to subpoena I have brought with me notes which I took concerning what was said during those proceedings.

Mr. Boecker: Your Honor, for the purpose of proving certain statements by defendant Cannella, who was a witness on that occasion, as outlined in my opening statement, may I now reveal a portion of the contents of this Grand Jury Proceedings?

Mr. London: If Your Honor please, we would like to have an opportunity of examining them for the purpose of making any objection.

The Court: Very well. I think you should.

Mr. London: We would like to examine it.

The Court: It is now ten minutes before twelve. Will it take five minutes or ten.

[fol. 35] Mr. Boecker: Let me ask the Court this: the transcript occupies about three pages relative to the portions I would like to offer. The entire transcript of the witness's testimony only runs possibly——

The Court: You don't have to exhibit all of that to them.

Mr. Boecker: Just the three pages.

Mr. London: We are requesting, Your Honor, that we be able to see this witness's entire testimony. If they are going to introduce a portion of it I think we have a right to see it in its entirety.

Mr. Boecker: I submit it would not all be relevant...

Mr. London: That is what we would have to determine. We have never had an opportunity to see what is in this transcript.

Mr. Shenker: We ask, if the Court please, that we be permitted to see it, Your Honor. Your Honor sustained the Government's position in the motion, of course. Now that they are offering any of that testimony, I think we ought to be able to examine all of that testimony in order that we can see, for the purpose of cross-examination, if there were any other statements which clarify this or contradict it.

Mr. Boecker: Perhaps to be on the safe side, they should be allowed to examine the witness's entire testimony. I am not going to press the objection.

The Court: Very well. Then, if the Government does not object you will be permitted to do it. We could probably conserve the time of everyone by recessing at this time.

Mr. Shenker: I was going to make a suggestion, if I may, Your Honor.

The Court: You may. The Court may not pay any attention to it.

Mr. Shenker: Perhaps the Government could use a different witness in the meantime, or if you think your direct testimony will take you long, you can go on with the witness and recess during the noon hour, we will examine it.

Mr. Boecker: Suppose I offer the portion I wish by this witness's direct testimony, and give counsel an opportunity to determine, by that time we may have reached the recess time.

Mr. London: We may want to object to something.

The Court: They may want to lay the ground to object to something.

Mr. Boecker: I was trying to expedite it.

The Court: They have a right.

Mr. Boecker: I will proceed with another witness.

The Court: Very well.

* * *

[fol. 36] HARRY ARNOLD testified as follows:

Direct Examination, by Mr. Boecker.

I was formerly a resident of the Greater St. Louis area, during which time I was acquainted with Joseph Costello, who is on trial here. When I knew Mr. Costello I was engaged in the automobile finance business. At one time I owned a license permitting me to deal in firearms.

Q. Mr. Boecker: Did you ever recall having a conversation with defendant Costello about the purchase or sale of firearms?

Mr. London: I want to object to this, if Your Honor please, as to defendant Cannella. It would be irrelevant and immaterial, it would be hearsay and have no binding effect on the defendant.

Mr. Boecker: I will offer it subject to connecting it up.

The Court: Proceed. With that understanding you may proceed.

A. If I could refer to——

Q. (By Mr. Boecker) My only question is, did you have, ever have such a conversation? A. Yes, sir.

Q. Can you fix the time and place within reasonable limitations, time and place where such conversation took place?

A. Again it would be difficult unless I could refer to——

Q. Go ahead, what do you want to refer to?

The Court: What do you want to refer to?

The Witness: Oh, sir, approximate time.

Q. (By Mr. Boecker) What is the paper you have?

The Court: Let's find out whether you have a right to do it. What memorandum do you have there?

The Witness: This is a statement I gave to the Federal Bureau of Investigation, sir.

Mr. Shenker: We certainly object to any reference to a statement of that nature, if the Court please. That is not proper matter to refer to; that is not his statement, that is a statement prepared by somebody else.

Mr. Boecker: I assume the witness will have to be in position to testify to his independent recollection.

[fol. 37] The Court: Well, qualify him before you attempt that.

I have in my pocket a copy of a statement which I gave to the Federal Bureau of Investigation relating to the subject matter of this question. At the time I gave that statement I had an independent recollection of the facts that I told the people——

Q. ——conducting that interview? And by referring to that statement do you believe that you will be able to refresh your recollection so that you will again have an independent recollection of the facts?

A. I would be in better position to, sir.

Mr. Boecker: I submit, Your Honor, the witness may with that in mind refer to the notes and be examined further.

Mr. Shenker: May I interrogate this witness pertaining to that?

The Court: You may.

I gave that statement to the Federal Bureau of Investigation in April, 1956. I had no records from which to ascertain dates for that statement.

[fol. 38] Since the time I have made the statement I have had some business difficulties and, of course, those were on my mind from the preceding time. The agents did not make any suggestions to me in the preparation of this statement. My statement has vague phrases there about where I was not sure. It was just a thought.

* * *

Mr. Boecker: The date on which he had any meeting with the defendants; he said he could fix that date by referring to the statements?

The Witness: Approximately.

* * *

The Court: But all that you want to fix, to bring out at this time is the date of the conversation?

Mr. Boecker: Correct, yes, Your Honor.

[fol. 39] The Court: And the witness says he can establish that by looking at this statement that he gave?

Mr. Boecker: Correct, and that he can refresh his independent recollection.

* * *

The Court: * * * Is that correct?

Mr. Shenker: Well, it is not.

The Court: All the witness wants to do is to look at a statement to refresh his recollection as to the date of the conversation?

Mr. Shenker: Your Honor, I think he cleared it up on his last statement, if I can just ask him.

Q. Mr. Shenker: Did you say just a minute ago, less than a minute ago, that you were just approximating at the time you gave the statement to the agent?

Mr. Boecker: I submit that is argumentative. The best evidence of what the witness said is in the record here.

The Court: Sustained.

Mr. Shenker: What is your answer, when you gave the statement to the agent?

The Court: You are making it difficult by the form of your question.

Q. Mr. Shenker: At the time the agent took your statement did you know or were you just approximating or guessing at that time as to the dates when you had the conversation with Mr. Costello? A. Approximating.

Mr. Shenker: Approximating. I will object, if the Court please, to this witness referring to any statement which he gave ex parte, of which counsel was not supplied a copy and which was given under questioning in the presence of an FBI agent or agents, and when this witness says even at that time all he was doing was approximating.

Mr. Boecker: I submit the facts would have to develop whether the approximation is of sufficient exactness to have probative value.

Mr. Shenker: But he does not know.

Mr. Boecker: He may be approximating within minutes, [fol. 40] days or weeks; how much is permissible?

The Court: You may go into how much approximation it was.

The Witness: Sir, it was a period of a few months.

The Court: What was a period of a few months?

• • •

The Witness: The approximate time of my contact with Mr. Costello.

The Court: Until you made a statement to the agent?

The Witness: No, at the time I made the statement, sir.

The Court: At the time. Do you know now how long it was from the time you had the contact with Mr. Costello until you made a statement to the agent, do you have that in mind what time elapsed?

• • •

The Witness: Approximately a year.

• • •

The Court: How long was it in time between your contact with Mr. Costello and your statement given to the agents, was it a week or month, or a year, or what?

The Witness: About a year, sir.

• • •

The Court: Did you have a clear recollection then as to what had taken place and as to the length of time elapsing?

The Witness: Fairly much so, sir.

• • •

[fol. 41] I obtained the statement about which I am talking on April 10, 1956, the same day I gave the statement.

Mr. Shenker: I renew our objection, Your Honor. A person just can't use——

The Court: Overruled.

• • •

Mr. London: I would like to add to my previous objection, Your Honor, that according to this statement, that any conversation he would testify to would be prior in time to the inception of the alleged conspiracy and prior in time to any of the substantive counts contained in the indictment and, therefore, hearsay as to defendant Cannella, and have no binding effect on defendant Cannella, and ask for that reason that they be not allowed in evidence.

Mr. Boecker: Well, it is not offered as part of the acts effectuating the conspiracy.

[fol. 42] The Court: For the purpose of refreshing this witness's recollection, is it not?

Mr. Boecker: That is right; but it is certainly pertinent to the proof of the substantive charges.

The Court: Objection overruled.

[fol. 43] After referring to the copy of the statement which I gave the FBI I would say that my conversation with Mr. Costello took place in the first part of 1955. I cannot be any more exact than that. As I recall, the conversation took place in the office where I was employed, which was the Financial Service Company in St. Louis, Missouri.

Q. Mr. Boecker: And what in substance was said by you and by Mr. Costello on that occasion?

Mr. London: I would like to renew my objection in view of what the witness just said, the conversation was early in 1955. According to the indictment the conspiracy was not alleged to be incepted until June, 1955. Therefore, these acts are prior to the inception of the alleged conspiracy and hearsay as to defendant Cannella.

Mr. Boecker: It is pertinent to the substantive counts.

Mr. London: The substantive counts did not take place until 1956, clearly prior to that.

Mr. Boecker: I think the preparation of the crime is competent evidence.

The Court: Objection overruled.

Mr. Costello called and wanted to see if I knew or if I had a .38 model Terrier Smith & Wesson. I advised him that I was a collector and did not necessarily deal in guns. I referred him to another dealer in the business of selling guns, his name was Earl Lewis of Granite City, Illinois.

This conversation with Mr. Costello was not in person, but was by telephone.

Q. Mr. Boecker: Did you recognize his voice?

Mr. Shenker: I object to the leading form of the question at this time, if the Court please. I ask it be stricken, purely a conclusion and opinion on the part of the witness testifying to a telephone conversation, no foundation having been laid for it.

The Court: You may go into the question.

Q. Mr. Boecker: Did you recognize the voice of the caller? A. I assumed it to be Mr. Costello.

Q. Did you recognize his voice?

Mr. Shenker: I ask that that answer be stricken.

The Court: Sustained.

Q. Mr. Boecker: Did you recognize his voice?

A. I can't honestly say, sir. I assumed it to be Mr. Costello.

Mr. Shenker: I will ask that that last part, if the Court [fol. 44] please, that last part "assumed it to be" be stricken.

The Court: Sustained. The jury is instructed to disregard it.

I have known Mr. Costello since about 1949 or 1950. I knew someone in St. Louis by the name of Buddy Walsh or John J. Walsh, and I have seen Mr. Costello in Buddy Walsh's place of business, which was at 5460 Natural Bridge. On that occasion I talked to Mr. Costello in person.

Q. Mr. Boecker: Do you recall if at that time there was any mention made of your interest in guns or of his interest in guns?

Mr. London: I would like to renew my objection and motion made earlier, this being a statement made by the witness prior to the inception of the conspiracy. It would be hearsay as to the defendant Cannella.

Mr. Boecker: It is offered subject to being connected up.

The Court: Very well. With that understanding it will be admitted.

In that conversation I possibly mentioned the fact that I had a federal permit and was interested in purchasing guns. The conversation at Walsh's place of business was three or four years earlier than the telephone conversation with Mr. Costello that I testified to previously.

Mr. London: In view of the answer, Your Honor, I would like to move that that portion of the testimony be stricken. It is obviously now much prior to the inception of any conspiracy charged in this case and totally irrelevant and incompetent.

Q. Mr. Boecker: Was there any subsequent meetings?

Mr. London: Just a moment. We haven't had a ruling on the objection.

• • • •

The Court: Objection overruled. Proceed.

I can recall no other meetings with Joseph Costello at that place of business.

Q. Mr. Boecker: For the purpose of refreshing the witness's recollection may I ask this question: If you recall in your statement describing that meeting, your statement to the FBI?

Mr. Shenker: I am going to object to that, if the Court please, being entirely leading and suggestive, and an attempt to impeach his own witness. It certainly is improper. The Court said the witness could use this statement to refresh his memory, that is one thing, but then for the counsel to suggest to him there what he set out in that statement is something entirely different, and we are certainly objecting to the form of the question.

[fol. 45] Mr. Boecker: I claim surprise as to the date, Your Honor. I would like to give the witness an opportunity to refresh his memory as to the date of that meeting he has just described.

The Court: Very well, you may do so.

Mr. Shenker: May we make our record, if the Court please.

The Court: You may.

Mr. Shenker: We would like to submit that this witness during the recess was talked to * * * by the United States Assistant Attorney, and also my information is that he was also, his testimony was discussed by agents of the bureau, and to come in at this time and claim surprise is totally improper and inadmissible and not made in good faith.

Mr. Boecker: I will certify to the Court that the only conversation I had with the witness was to ask him to return earlier for the purpose of reviewing his statement; and I will further certify that I had no further conversation with him. I will certify further that I instructed an agent of the FBI to ask him whether each statement in the written statement was true to the best of his recollection and belief, and that is the extent of any interview between our office or the FBI and this witness.

The Court: Mr. London?

Mr. London: I will just join in Mr. Shenker's statement, Your Honor.

Mr. Boecker: I believe Your Honor has ruled that the witness might be refreshed, might be referred to his statement for the purpose of refreshing his recollection on the date of this meeting. May I then proceed with that examination?

The Court: You may.

By referring to my statement to the FBI I find, I recall that it was a matter of months between the conversation at Jimmy Walsh's and the telephone conversation that I referred to earlier.

Q. Mr. Boecker: When you received this phone call that was referred to in your testimony before lunch, did you recognize the voice of the caller?

A. If I can, Sir, I assumed it to be Mr. Costello.

Mr. Shenker: I will ask that that answer, if the Court please, be stricken.

The Court: Sustained.

[fol. 46] Q. Mr. Boecker: Did you recognize the voice of that caller as being the voice of anyone present at the meeting you have just described?

A. I can't honestly say, Sir. * * *

Q. Mr. Boecker: Let me ask you if during the course of the noon recess did you state to anyone that the voice on the phone was the same voice as Costello's voice when you talked to him in person?

[fol. 47] Mr. London: I object as leading and suggestive.

The Court: Sustained.

Mr. Boecker: Your Honor, I claim surprise and I ask the privilege of cross-examining the witness.

Mr. Shenker: I will also, if the Court please, point out to the Court that this question which allegedly puts a statement that this witness should have made during the recess, that it is contrary——

The Court: The Court has already sustained your objection * * *

Mr. Boecker: Your Honor, may I make my record? I claim surprise on this portion of the witness's testimony and ask the right to cross-examine him.

Mr. Shenker: Renewing our objection, if the Court please, on the basis of the statements which we have previously made, that no proper foundation was laid for the cross-examination of this witness, for the further reason that no proper showing has been made on it and that certainly before a party who offers a witness is permitted to cross-examine him or claim surprise, certain proof must be offered to the Court as to the conduct of that party with reference to the witness.

Mr. London: I would like to join in Mr. Shenker's statement and add to that that Mr. Boecker certified what conversation was had with the witness during the noon recess, and the question he posed to this witness was not included in that certification.

Mr. Boecker: I think it is a rather shallow construction after all is said and done.

The Court: Objection overruled. You may proceed, Mr. Boecker.

Pursuant to Mr. Boecker's request I came to the courtroom earlier than the usual time for court and I was talked to by an FBI agent. He went over my statement to the FBI and asked me about the contents thereof. The agent's name was Bush.

Q. Mr. Boecker: During the course of that interview with him and in going over the statement did you make any statement to him in which you made a comparison between the voice on the phone and the voice of Joe Costello [fol. 48] as you heard it at the meeting at Jimmie Walsh's or Buddy Walsh's?

A. The question is, sir, if at the time did I verify the fact Mr. Costello wanting any further firearms, if the voice was the same as was on the phone at the first time, and I told him that I thought it was the same voice.

Q. So we do not misunderstand, which two times are you talking about now?

Mr. Shenker: I will ask that the last statement be stricken because obviously we had no opportunity to object until the witness answered, because here he is giving his conclusions and opinion, not responsive to the question. He was only asked by Mr. Boecker if that certain question was

asked of him, and he volunteered the information. * * * It relates to an entirely different conversation, an entirely different time, Your Honor, and is not responsive to the question.

Mr. Boecker: I submit that it is, Your Honor.

The Court: Well, I will sustain the motion and strike the question and the answer because I think each tend to be a little bit confusing, so I will strike the question and strike the answer and direct the jury to disregard it.

Mr. Boecker: May I rephrase the question?

The Court: You may.

Q. Mr. Boecker: During the course of your interview during the noon hour with Agent Bush, did you state to him any comparison between the voice on the one occasion as being the voice of Joe Costello that you heard on some other occasion in relation to this firearm episode?

A. I told him I thought——

Mr. Shenker: I am going to object to the last part "this firearm episode," Your Honor, because I read that statement and it deals with a conversation that took place at an entirely different time.

The Court: I am going to sustain the objection to the question as asked, and strike the question and the answer, if any; and ask one question at a time and maybe we can [fol. 49] avoid this confusion. You may have permission to proceed.

* * *

Q. Mr. Boecker: During the noontime interview with Agent Bush, what statement or statements, if any, did you make to him regarding the identity of the voice on the telephone?

* * *

Mr. Shenker: Of course, we will object to the form of the question, Your Honor, because certainly this calls for a roving commission of this witness, and it is improper impeachment of his own witness. In other words, it sort of gives him a roving commission, what statement or statements did you make.

The Court: Overruled.

A. I told him that the voice I thought was the same that was on the phone, Mr. Costello, I assumed, called me as that when I spoke to him in person.

The Court: What? Read that answer.

(Answer read.)

The Court: Now, answer that question as asked, and don't go into any long-winded recitation or long conversation. Just answer the question as asked.

The Witness: Your Honor, I tried to do that by——

The Court: Don't argue with me. Answer the question.

The Witness: The only way I can answer it, sir, is if, in answer to his question I told him that I thought the [fol. 50] voice was the same as when I had spoken to him, Mr. Costello, that is.

The Court: Proceed.

Q. Mr. Boecker: Now, during the course of that conversation over the telephone, referring back to the same conversation we talked about before lunch time, did the caller identify himself by name to you?

Mr. Shenker: I object to that, if the Court please, because he did not say, this is the first thing, the witness did not say that that was the conversation that he was talking about; and, secondly, someone identifying themselves on the other end of the wire, certainly that is purely hearsay and not binding on anyone, and certainly not the defendants in this case.

The Court: Overruled.

* * *

A. He said it was Joe Costello.

Q. Mr. Boecker: And thereupon, is that the conversation during which you mentioned Earl Lewis of Granite City to him as being a gun dealer? A. Yes, sir.

Thereafter, I called Earl Lewis.

Cross-Examination, by Mr. Shenker.

I met Mr. Costello in about 1950 at his office. I next saw him a few years later at Mr. Walsh's place of business. I do not recall if I ever saw him after that.

I had a telephone conversation wherein I mentioned a man by the name of Lewis, the party to whom I was speaking said that he was Joe Costello. I do not recall when that conversation took place. It is possible that the person to whom I was speaking in that conversation said he was Joe Cannella of Ace Cab and that I thought it was Joe Costello.

In June of 1955 I called Mr. Costello suggesting that I had some firearms if he wanted to buy any. He said he would come out and take a look at them but he never did. My place of business was right here in St. Louis and I had [fol. 51] a license to sell guns. I do not recall what portion of June that conversation was.

The conversation in which I mentioned the name of Earl Lewis was prior to the June conversation. That conversation might have been in the year 1954.

My conversation with Agent Bush during the noon recess lasted about three minutes. They did not go over my statement with me word for word.

Redirect Examination, by Mr. Boecker.

In the telephone conversation of June, 1955, about which I have testified, I am not sure that the party to whom I was talking was Mr. Costello. It was the same voice as on the first time. I asked if it was Joe Costello and asked if he was interested in some guns.

Recross-Examination, by Mr. Shenker.

I recall no mention of Mr. Lewis in that conversation. There would be no point in a mention of Mr. Lewis at that time since I offered to sell the guns. The party to whom I spoke said he would come by and look at the guns but he never did.

MRS. EVELYN WEIR continued her testimony as follows:

Direct Examination, by Mr. Boecker.

I have with me my shorthand notes which I took when I was officially reporting Grand Jury proceedings on April

23rd. During the Grand Jury proceedings on April 23 the questioning and answering of witnesses and whatever was said was translated by me into shorthand notes and these notes are a correct recording of what was said on that occasion.

At the proceedings a witness was sworn and gave the name of Joseph Cannella.

Q. Can you, of your own knowledge, identify anyone in the courtroom as being that witness?

Mr. London: We object to that, Your Honor.

(At this point there was a side bar conference between, [fol. 52] the Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. London: We will object, of course, to any testimony given before the Grand Jury being offered in evidence on the grounds it is hearsay, and also on the grounds it is testimony by the defendant when that defendant was not afforded the opportunity to have counsel; and we will also object, if Your Honor please, the transcript which Mr. Boecker has furnished to us is only a partial transcript of the testimony of this witness.

Mr. Boecker: That is not true.

Mr. London: This transcript refers to other testimony given by this witness before the same Grand Jury touching upon other matter on the investigation. We do not have that before us. We cannot therefore make proper objections to it.

We will further object, based upon Mr. Boecker's opening statement. The evidence shown in this transcript is based, and the evidence which Mr. Boecker intends to offer of a statement given to FBI agents, and to place both the statement of the FBI agents and then the transcript or any portion thereof into evidence would prove a crime against this defendant, Cannella, different from the crime of which he stands charged, the crime of either perjury or giving false information to a federal agent.

Mr. Boecker: Well, the objection assumes a good deal, assumes much which is not being offered. The testimony is offered for the purpose of proving a simple admission which occupies three pages of the transcript, and I invite

Your Honor to examine it, and I will promise you that the testimony will be limited to that portion of the testimony which is simply to the effect that he knew the co-defendant had a criminal conviction in his record.

Mr. London: To use a portion of a document, the transcript, Your Honor, we must have an opportunity to examine it in its entirety. Possibly there is something in the other testimony——

The Court: I thought you said before you would give it to him.

[fol. 53] Mr. Boecker: I gave him the entire day's proceedings.

Mr. London: This witness was evidently there on a different day.

Mr. Boecker: It is Mr. London's client. If that witness was there he certainly knew it. If this witness didn't tell him, he can't be surprised if I didn't search my files. I gave you what you asked for, Mr. London. I submit nothing in the previous day's testimony would have any bearing on this case.

The Court: Do you question he gave you what you asked for?

Mr. London: Your Honor, in this respect: I asked for a transcript of the witness's testimony, the witness being a defendant. Now, in this testimony Mr. Boecker gave me it refers to testimony given by Cannella on another party.

Mr. Boecker: It is true it was another party [day]. Certainly counsel would know what his own client's appearances were.

Mr. London: I don't know what he said.

Mr. Shenker: How do we know. We asked and understood he was going to furnish us the Grand Jury testimony.

Mr. Boecker: The ultimate fact is much of this is not relevant. We want to avoid just these side issues here. I should not be made to furnish the whole day's proceedings.

The Court: Objection overruled. Proceed.

Mr. Shenker: May the record show, if the Court please, that we are objecting, defendant Costello is objecting to it on the ground that this is purely hearsay as far as Costello is concerned, not binding on him; and for the further reason that it is impossible for counsel for Costello to cross-examine this witness in the absence of all the testimony that was given by this witness before the Grand Jury; that this is naturally a part of the testimony that was given by this witness, and the record clearly shows that we were not furnished with copy of all the testimony given by the witness to the Grand Jury on this subject matter.

Mr. London: We want to add in our record, Your Honor, this testimony by Mr. Boecker is being offered to show knowledge of Mr. Cannella of the criminal record of Mr. Costello. I want to object. From the transcript itself [fol. 54] it states Cannella had knowledge of a criminal record, but under the statute he is required to have knowledge Costello has committed a crime of violence as specifically defined in the statute, and there is nowhere in the statute anything to show he had that knowledge. Therefore, it would be irrelevant and immaterial, does not tend to prove or disprove any of the issues in this case.

Mr. Boecker: I submit it is sufficient admission in there to bring him within the cases.

The Court: Objection overruled. Proceed.

(The trial was then resumed before the jury, and the following occurred:)

Q. Mr. Boecker: Read the first question and answer, please. A. State your name, please. Joseph Cannella.

Q. And the next question and answer.

A. You are the same man who was sworn as a witness before this Grand Jury Wednesday of last week, are you? Answer: Yes, sir.

Q. The next question and answer, please.

A. Mr. Cannella, I believe I should tell you that you are not required to make any statement here that might tend to incriminate you. Do you understand that. Answer: Yes, sir.

* * *

Q. Continue up to—well, continue until I interrupt. I think that might be simpler.

A. Question: How long have you been employed by Ace Cab Company. Answer: About seven years, I guess. Question: That would make your employment start at about 1949? Answer: About, yes. Question: And how did you come to be employed there? Answer: Well, I had a tavern and restaurant and could not make a go of it there so with my education I did not know anything else. I figures I would drive a cab, that is all. Question: How did you happen to become employed by the Ace Cab Company? Answer: That is the first one I went to. Question: Was it your [fol. 55] intention to go down the line, go from company to company? Answer: That is the first one I went, and they hired me. Question: Who interviewed you, do you remember? Answer: No, sir, I don't. Question: Did you talk to Joe Costello at that time? Answer: I think it was Bill James. I would not say for sure because I don't remember. Question: When did you first make the acquaintance of Joe Costello? Answer: I was there quite a while, I guess. I don't remember. Question: You say you didn't know Costello at the time you were first employed? Answer: No, sir. Question: You met him after you started working there? Answer: Yes, sir.

Mr. London: Just a moment, please.

(There was a side bar conference between Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. London: This next question and answer. I want to object to this portion of the testimony on the grounds that at the time this man was being questioned before the Grand Jury he was a prospective defendant, that he was not advised of his rights as a prospective defendant, and that he was not afforded an opportunity to know that he was being investigated himself and was not merely brought before this body as a witness.

Mr. Boecker: He was advised of his constitutional privileges.

Mr. London: He was not advised he was a prospective defendant and was not appearing just as a witness.

Mr. Shenker: And he was not advised that anything he says may be used against him either.

Mr. Boecker: That is not what the Constitution says. It says nobody shall be required to testify against himself, and that is the warning he was given.

The Court: Overruled.

(The trial was then resumed before the jury, and the following occurred:)

Q. Mr. Boecker: Will you continue reading the questions and answers, please?

A. Question: When did you first know that Costello—let me say, when did it first come to your attention that Costello had a reputation of having a criminal record? [fol. 56] Answer: I was there a while and you hear people talking about it, that is all. Question: What did you hear? Answer: That he had been in trouble other than that, that is all. Question: Did you know the nature of the trouble? Answer: No, sir. Question: Did you know whether it was burglary or holdup, or what it was? Answer: No, sir. Question: Did you know that it reflected that he had been in prison? Answer: I had heard that, yes, sir. Question: That he had been in the State Penitentiary? Answer: I don't know where. Question: Just that he had been in prison? Answer: That is all. Question: That he had been convicted of some crime? Answer: yes, sir. Question: But you don't know the nature of the crime? Answer: No, sir, I don't. Question: That was a matter of general——

Mr. Shenker: Just a minute. At this time, if the Court please, I would like to call the Court's attention to the fact this is an attempt by indirection by the Government to do that which they cannot do directly, and that is to place Mr. Costello's reputation in issue, and his reputation is not in issue, and this is an attempt to get in by indirection matters which cast aspersions on Mr. Costello's reputation. We submit that it is hearsay, incompetent, illegal, an improper comment on defendant's Constitutional rights.

Mr. Boecker: Your Honor, the question regarding his reputation relates only to that which is a proven fact, and that is that he has been convicted, which has been proven in the case. The question that Mr. Shenker refers to is

limited to his reputation as having had a criminal conviction.

The Court: What was your objection?

Mr. Shenker: My objection is that it is improper and it is an illegal comment on defendant's Constitutional rights and puts his reputation at issue which is not at issue before defendant takes the stand.

The Court: Overruled. Proceed.

Q. Mr. Boecker: The point at which you had been reading, would you read that question and answer, and the following question and answer, and then stop, please?

Mr. Shenker: Which question is that, Mr. Boecker?

The Witness: It starts That was a matter of general comment. Question: That was a matter of general com- [fol. 57] ment from time to time, was it, the man's reputation? Answer: You heard it around. Question: Which you might call was a matter of general reputation that was connected with him? Answer: I guess so, yes.

Mr. Boecker: I have no further questions of this witness.

Mr. Shenker: May I in order to protect my record, Your Honor, ask that all that be stricken from the record on the ground it is incompetent and prejudicial against the defendant.

The Court: You may. Overruled.

Cross-Examination, by Mr. London.

Q. Would you continue and read the next question and answer immediately after you left off?

Mr. Boecker: I will submit that the cross-examination would go beyond the scope of the direct with the answer to the question Mr. London asks.

Mr. London: If Your Honor please, if this document is going to be read to the jury in part, I think we have the right to read certain parts to the jury also.

Mr. Boecker: I believe I stopped where a new subject matter commenced, the very last question on the bottom

sheet would be the next one. I submit that would go beyond the scope of the direct examination. My objection, Your Honor, is that the cross-examination goes beyond the scope of the direct examination because the subject matter referred to in the very first question on cross-examination is entirely different from what I referred to in direct.

Mr. London: The direct examination, however, Your Honor, was a portion of this transcript from which I am reading. I believe authorities will sustain me if he has introduced a portion of it I have the right to introduce another portion of it if I so choose.

Mr. Boecker: Only where it is relevant to the subject matter, and the rule in Federal courts is cross-examination is limited to the scope of the direct. He may adopt the witness as his own in his case in chief.

The Court: Objection sustained.

Mr. London: May I make an offer of proof, if the Court please.

[fol. 58] (At this point there was a side bar conference between the Court and counsel, during which the following occurred:)

Mr. London: The offer of proof, may the record show, if this witness were permitted to answer the questions that her answer would be as follows: (reading from the transcript of the Grand Jury testimony of defendant Cannella:)

Question: Now, isn't it a fact when you went over to the Lewis Gun Shop in connection with the purchase of the gun that was found in Costello's car the first time you went over that time, you went with Costello, didn't you? Answer: Yes, sir. Question: Did he go into the shop or wait outside? Answer: He waited outside. Question: Didn't he come in sometime during the time you were there? Answer: Yes, he did. I was in there ten or fifteen minutes and he come in and said, "I am in a hurry". Question: Did he also look at the catalogue? Answer: Yes. I asked him to. Question: Did he help you in making the selection? Answer: I asked him which one would you take if you were buying it. He said I would take this one. Question: Of course, he was buying one, wasn't he? An-

swer: No, sir. No, sir. Question: You were over there as his go-between to sign for that gun? Answer: No, sir, I was not, sir.

I am skipping a portion of the testimony of defendant Cannella before the Grand Jury. Now, I am assuming, Your Honor, that in the questions that I would ask from this testimony, it would be sustained as the Government's objection.

Mr. Boecker: My objection is that it is cross-examination beyond the scope of the direct examination.

Mr. London: Your Honor, I am going to read portions of this transcript. I am assuming any questions which I would ask this witness from this transcript, the Government's objection would be sustained on the grounds that the Government has just asserted; otherwise I will ask the question again and let the Government make their objection again. I have other questions from this transcript that I want to ask this witness. May the record show that the Government's objection to all of those questions would be sustained on the same grounds as the Government has asserted?

[fol. 59] The Court: Well, I am not familiar with all the questions, but I presume that that is so.

Mr. Boecker: I think if my recollection is correct, that the same objection would go to the entire remainder of that transcript.

Mr. London: All of the questions are about the transcript, Your Honor.

The Court: I imagine you are correct on that.

Mr. London: Question: It was in the paper that he had a record of burglary conviction. Answer: I didn't pay too much attention; I haven't got that much education. Question: You read the papers? Answer: As much as I can. Question: You listen to the radio? Answer: Yes, sir. Question: Where they mentioned the man you are working for, you are interested, aren't you? Answer: No, sir, I am not interested.

Mr. Boecker: I would not make the objection to that portion. I had forgotten, I had forgotten that episode was in there.

Mr. Lon[redacted]ell, we will make our record on the rest of it and c[redacted]k and have that part read.

Mr. Boecker: All right.

Mr. London: Question: Now, before you made that first trip you had been to see a man by the name of Klaich, Charlie Klaich, who runs a resturant at Twenty-First and Clark? Answer: Yes, sir, Twenty-First and Clark. Question: How did you happen to go see him? Answer: I eat there all the time. Question: Didn't Joe Costello tell you he was interested in buying a gun? Answer: No, sir. Question: Did somebody else tell you that he was interested in buying a gun? Answer: No, sir. Question: How do you say you heard he was interested? Answer: Like I say, I eat there and we got talking, and he said he needed a gun for protection, and I said well, we got fellows that have been around the house, broke in the car once, and I am going to try to get myself one. If I do I will try to pick you one up, and he said all right.

Mr. Boecker: I object to that as beyond the scope of the direct.

Mr. London: This is the offer of proof that we are making, now, all of this.

[fol. 60] Question: Didn't Joe Costello tell you he was interested in buying a gun? Answer: No, sir. Question: Did somebody else tell you that he was interested in buying a gun? Answer: No, sir. Question: The first time you went with Joe Costello when you and he looked at the catalogue, is that right? Answer: I went in and looked. I was in there about ten minutes. He came in and said he was in a hurry, let's get going. Question: He looked at the catalogue? Answer: Yes, sir, I asked him to. Question: And the second time you came by yourself and Lewis had some guns there that you did not take? Answer: They was not the ones I had looked at. Question: The second time you went there he had some guns he wanted to deliver to you? Answer: Yes, sir.

Mr. Boecker: Same objection.

Mr. London: Question: All right. Let's go back to the time you came from Lewis. You left Lewis with the three guns. What did you do? Answer: I brought them back

and took one over to Charlie Klaich. Question: The same day? Answer: Yes, sir. And the other one, I took out to Price. Question: To the apartment? Answer: Yes, sir. Question: Was he there when you got there? Answer: Yes, sir. Question: What time of day was it? Answer: It was in the afternoon sometime, I am almost sure it was. Question: Then what did you do with it? Answer: I put it in the top of the closet, and the wife kept raising the devil, she was scared of that thing around there. Question: When did she say that, the same day? Answer: I don't remember. No, I think it was later on. She got thinking about the little one around.

Mr. London: That is the offer of proof.

Mr. Boecker: Same objection as to the others except as to the portion where I indicated no objection.

Mr. London: I continue with the offer. Question (By Mr. Boecker): Mr. Cannella, the last time you were here you told us that you took the gun from your home and carried it in your cab, do you remember that? Answer: I put it in there on Saturday, yes, sir. Question: That would be February 25 of this year? Answer: Yes, sir. Question: When do you say you transferred that gun to Costello's Cadillac? Answer: Sunday, sir, when I took his car, which was the following day. Question: Did you [fol. 61] leave your house with your cab and leave it at the lot and pick up the Cadillac? Answer: Yes, I left the house with my cab. Question: When you got to the lot where did you park? Answer: I parked up, we got a garage there and got a wash rack and I checked it. Question: Where was the Cadillac, was it there? Answer: It was around the back of the garage. Question: Did anybody see you transfer this gun from one car to the other? Answer: I don't know, sir. Question: What was your purpose in putting the gun in the Cadillac? Answer: I was going to take it home. Question: What? Answer: The gun, I had not seen that fellow I was supposed to see and I didn't want to carry it around, so I was going to take it home. Question: I thought you expected to see the fellow while you were—I understood that you put this gun in the Cadillac because you expected to see that fellow. Answer: I was going to take it home. Question: How long had you been carrying it around in a cab looking for a fellow to

buy it? Answer: I looked for it Saturday. Question: Did you put it in your cab Saturday? Answer: Yes, sir. Question: Did you look all day Saturday? Answer: Yes. Question: Did you work all day Saturday? Answer: Yes. I worked until the time I got home. I imagine it was about five o'clock when I got home Saturday. Question: When had you seen that man before this? Answer: It was just a day or two before that.

Mr. London: That will be the end of the offer of proof.

Mr. Boecker: Your Honor, I submit that the entire scope of examination that is read is beyond the direct except for a small portion there in the middle, but there is one small portion that relates to the same subject matter to which I make no objection. I will find that.

Mr. London: Your Honor, as we indicated earlier, we are not offering this as direct evidence. This witness was called to relate the testimony of defendant Cannella before the Grand Jury. We are offering this as a portion of his testimony before the Grand Jury, which I believe we are entitled to do in our cross-examination due to the fact that the Government has first made use of this document, and of this transcript of testimony.

Mr. Boecker: The witness was offered for the limited purpose of proving the admission regarding his knowledge of the conviction, that is all.
[fol. 62] I make no objection to that portion on page 5 of this transcript that refers to newspaper and radio publicity.

Mr. London: That would be the question starting with, it was in the paper that he had a record of burglary conviction, and continuing down to the answer, no, sir, I am not interested. Correct?

Mr. Boecker: That much I do not object to. I think that is proper cross-examination.

Mr. London: Four questions and four answers.

Mr. Boecker: The entire remaining portion I submit is beyond the scope of the direct.

The Court: Sustained.

(The trial was then resumed before the jury, and the following occurred:)

Q. Mr. London: Mrs. Weir, I direct your attention to page 5 of the transcript of Mr. Cannella's testimony. * * * Do you find a question, it was in the paper that he had a record of burglary conviction?

A. I have that.

Q. All right. Would you read that question and that answer, the answer given in response thereto?

A. Question: It was in the paper that he had a record of burglary conviction. Answer: I did not pay too much attention. I haven't got that much education.

Q. Would you read the next question and answer?

A. You read the papers? Answer: As much as I can.

Q. And the next question and answer?

A. Question: You listen to the radio? Answer: Yes, sir.

[fol. 63] Q. And the next question and answer?

A. Question: When they mention the man you are working for, you are interested, aren't you? Answer: No, sir, I am not interested. * * *

I typed up my notes which came to 24 typewritten pages and that is the only day's testimony I took of this witness. I am not the only grand jury stenographer. Olive Poole is one.

Q. I will ask you, Mrs. Weir, if your notes reflect any questions which would indicate that there was testimony given by this witness on a previous occasion?

Mr. Boecker: I will submit that calls for a conclusion. I think the Court has had a chance to acquaint itself with this.

The Court: Sustained.

Mr. London: Do you sustain the objection on the ground of conclusion?

Mr. Shenker: If the Court please, I do think, though, we are certainly entitled to have the record show that this witness testified at a time prior to this date before the same Grand Jury, and that we were not furnished with copies of the transcript of that testimony. We certainly want the record to show that, and that this witness did not bring in that testimony.

Mr. Boecker: I submit that counsel has not laid any foundation, he has not indicated that there would be any-
[fol. 64] thing in that other testimony that relates to this.

Mr. London: We can't lay any foundation, Your Honor. We have no way of knowing whether there is anything in that other testimony that relates to this.

Mr. Boecker: Mr. London is in position to lay the foundation. It is his client. He can find out from his client if there is any foundation. I submit there is none.

The Court: Sustained.

Mr. Shenker: I am certainly not in position to so state. My information is that it was questions pertaining to the same subject matter.

Mr. Boecker: I submit, Your Honor may properly give an instruction at this time that this testimony is limited to defendant Joseph John Cannella.

The Court: The Court so ruled.

* * *

Q. Mrs. Weir, I will direct your attention to the testimony of the defendant Cannella, which you gave to Mr. Boecker, and ask you to repeat the question, the second question and the second answer thereto.

A. You are the same man who was sworn as a witness before this Grand Jury Wednesday of last week, are you? Answer: Yes, sir.

I did not take the notes of the proceedings on the Wednesday referred to in that question. I believe Olive Poole did and she is in Cape Girardeau.

Q. Do you know how long she will be in Cape Girardeau?

[fol. 65] Mr. Boecker: Your Honor, I submit there is no foundation for this line of questioning here. Counsel has never undertaken to show that there would be anything in the earlier day's proceedings that would in any way relate to this.

The Court: Objection sustained.

The testimony which I have given concerning Cannella's testimony before the Grand Jury has been read from some notes which I have.

Q. And may I see those notes? Have these been marked in evidence, Mr. Boecker? Would you have the portion marked that you have had her read from, or I would like to request that this be marked since the witness has admitted she has been reading from it.

Mr. Boecker: I do not think any of us can read it.

Mr. Shenker: Why don't you just have the transcript marked?

Mr. London: I desire after we get this, to get it identified with the transcript.

Mr. Boecker: Well, the evidence is in.

Mr. London: I believe, Your Honor, if she is reading from this, for the purpose of the record that this should be marked.

Mr. Boecker: I submit there is nothing on which the Court can rule. It is my witness. I have not offered anything of that nature.

Mr. London: He is offering her testimony, and she has admitted she was reading directly from this.

Mr. Boecker: I do not think it is proper to have these Grand Jury proceedings made a part of the record in this case except insofar as they are relevant in this case. The rule of court is that—in fact, the rules of our entire system of procedure is that they must remain secret except insofar as the court for good cause permits them to be revealed.

The Court: Your motion is overruled.

Q. Mr. London: It was your testimony, was it not, Mrs. Weir, that those notes that you have there resulted in twenty-four typewritten pages?

Mr. Boecker: I might add to my previous remarks that [fol. 66] the record is certainly available for the Court to examine and verify the fact that only relevant portions are revealed, and that those which remain are not relevant, and I will make that copy available to the Court now and any time.

The Court: Very well.

A. There were twenty-four pages, yes.

Q. Mr. London: Mrs. Weir, I hand you what has been marked as Defendant's Exhibit A, being twenty-four typewritten pages, and ask you if this is the transcription of your notes of the testimony of the defendant Cannella given before the Grand Jury?

Mr. Boecker: I would think that she would have to check it against her notes since this is not the transcript that she prepared. It is a copy from a copy made by someone, whom we do not know.

Mr. London: Mr. Boecker has refused to allow me to have the transcript which she prepared marked in evidence, Your Honor.

Mr. Boecker: Now, I have given the transcript to Mr. London to read and examine for the benefit of him and his client. He has got here an entirely different piece of paper.

The Court: Objection sustained.

I took notes of proceedings on April 23, 1956, when Cannella appeared before the Grand Jury.

Q. I will ask you, Mrs. Weir, if it is not a fact that during those proceedings that there was no mention made or no question directed to Mr. Cannella concerning a gun which he allegedly gave to the Federal Bureau of Investigation?

Mr. Boecker: I will object to that as beyond the scope of the direct examination, and calling for a conclusion of the witness.

[fol. 67] The Court: Sustained.

Mr. London: May I make an offer of proof, if Your Honor please.

The Court: Very well.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. London: For the offer of proof, may the record show that if this witness were permitted to answer this ques-

tion she would testify that there is no question directed to the witness Cannella, or no reference made during the Grand Jury proceedings now in question, to any statement or alleged statement made by defendant Cannella to any agents of the Federal Bureau of Investigation.

Mr. Boecker: Same objection, beyond the scope of the direct examination, calls for a conclusion, and also irrelevant and immaterial.

The Court: Sustained.

Mr. London: Mr. Boecker, I talked to you about this before, all of our previous offers of proof, it may be stipulated, come from Mrs. Weir's notes, is that correct, all Grand Jury proceedings of defendant Cannella, all of the questions and answers which I have read in the record.

Mr. Boecker: I think it might be stipulated the offer of proof is derived from this witness's notes on the date in question.

Mr. London: And that includes the offer of proof made prior to the recess of questions and answers.

Mr. Boecker: I think that is true.

Mr. London: It may be so stipulated.

[fol. 68] Defendant's Exhibit A.

(Referred to above but not admitted into evidence.)

The Federal Grand Jury reconvened at 10:00 o'clock a. m., Monday, April 23, 1956, at the United States Court and Customs House, 1114 Market Street, St. Louis, Missouri.

Appearances:

Harry Richards, U. S. District Attorney,
Forrest Boecker, Asst. U. S. Atty.

(Eighteen Grand Jurors Present.)

JOSEPH CANNELLA, recalled, sworn, and testified as follows:

Direct Examination, by Mr. Boecker.

Q. State your name, please. A. Joseph Cannella.

Q. You are the same man who was sworn as a witness before this grand jury Wednesday of last week, are you?

A. Yes, sir.

Q. Mr. Cannella, I believe I should tell you that you are not required to make any statement here that might tend to incriminate you, you understand that? A. Yes, sir.

Q. How long have you been employed by Ace Cab Company? A. About seven years, I guess.

Q. That would make your employment start at about 1949? A. About, yes.

Q. And how did you come to be employed there?

[fol. 69] A. Well, I had a tavern, a restaurant and couldn't make a go of it there, so with my education, I didn't know anything else—I figured I'd drive a cab, that's all.

Q. How did you happen to become employed by the Ace Cab Company? A. That's the first one I went to.

Q. Was it your intention to go down the line, go from company to company?

A. That's the first one I went and they hired me.

Q. Who interviewed you, do you remember?

A. No, sir, I don't.

Q. Did you talk to Joseph Costello at that time?

A. I think it was Bill James—I wouldn't say for sure, because I don't remember.

Q. When did you first make the acquaintance of Joe Costello?

A. I was there quite a while, I guess, I don't remember.

Q. You say you didn't know Costello at the time you were first employed? A. No, sir.

Q. You met him after you started working there?

A. Yes, sir.

Q. When did you first know that Costello—let me say, when did it first come to your attention that Costello had the reputation of having a criminal record?

A. I was there a while and you hear people talking [fol. 70] about it, that's all.

Q. What did you hear?

A. That he'd been in trouble, other than that—that's all.

Q. Did you know the nature of the trouble? A. No, sir.

Q. Did you know whether it was burglary or hold-up, or what it was? A. No, sir.

Q. Did you know that it reflected that he had been in prison? A. I had heard that, yes, sir.

Q. That he had been in the state penitentiary?

A. I don't know where.

Q. Just that he had been in prison? A. That's all.

Q. That he had been convicted of some crime?

A. Yes, sir.

Q. But you didn't know the nature of the crime?

A. No, sir, I don't.

Q. That was a matter of general comment from time to time, was it—the man's reputation?

A. You heard it around.

Q. Which you might call was a matter of general reputation, that was connected with him? A. I guess so, yes.

Q. Now, isn't it a fact that when you went over to the [fol. 71] Lewis Gun Shop in connection with the purchase of the gun that was found in Joe Costello's car, the first time you went over in that connection you went with Costello, didn't you? A. Yes, sir.

Q. Did he go into the shop or wait outside?

A. No, sir, he waited outside.

Q. Didn't he come in sometime during the time you were there?

A. Yes, he did. I was in there ten or fifteen minutes and he come in and said, "I'm in a hurry"——

Q. Did he also look at the catalog?

A. Yes, I asked him to.

Q. Did he help you in making the selection?

A. I asked him which one of the two would you take if you were buying it, and he said, I'd take this one.

Q. Of course, he was buying one, wasn't he?

A. No, sir, no, sir.

Q. You were over there as his go-between to sign for that gun? A. No, sir, I was not, sir.

Q. But he aided in picking out two Chief Special revolvers, or three?

A. He said, between the two, if I was buying it for myself, I'd take the Chief.

Q. Do you know what kind of gun he kept in his desk?

A. No, sir.

[fol. 72] Q. Did you ever see it?

A. I was never in there that much.

Q. Did you know he kept a gun in his desk?

A. No, sir, I didn't.

Q. Did you know he had owned at least one other Chief Special revolver, besides the one you purchased that day?

A. No, sir.

Q. You knew it when he shot himself?

A. I didn't know what kind it was.

Q. You knew he shot himself?

A. What I read in the paper.

Q. It was in the paper that he had a record of burglary conviction.

A. I didn't pay too much attention. I haven't got that much education.

Q. You read the papers? A. As much as I can.

Q. You listen to the radio? A. Yes, sir.

Q. When they mentioned the man you were working for, you are interested, aren't you?

A. No. sir, I am not interested.

Q. You knew Joe shot himself?

A. Everybody knew that, sir.

Q. That he shot himself with a revolver?

[fol. 73] A. Yes, sir.

Q. Surely during the news broadcasts and news stories, you remember it was mentioned that he was connected with the Greenlease case? A. Everybody remembers that.

Q. And you knew he had been convicted of burglary?

A. I didn't remember that.

Q. All you know is the general talk that he had a record, is that right? A. That's all.

Q. How many trips did you make to the Lewis Gun Shop in connection with buying these pistols?

A. Well, I made one—two—three.

Q. The first time you went with Joe Costello? A. Yes, sir.

Q. The other two times you were alone, is that right?

A. Yes, sir.

Q. The other two times, were you driving your cab?

A. Yes, sir.

Q. Now, before you made that first trip you had been to see a man by the name of Klaich? A. Charley Klaich.

Q. He runs a restaurant?

A. At 21st and Clark—yes, 21st and Clark.

Q. How did you happen to go see him?

[fol. 74] A. I eat there all the time.

Q. Didn't Joe Costello tell you he was interested in buying a gun? A. No, sir.

Q. Did somebody else tell you that he was interested in buying a gun? A. No, sir.

Q. How did you say you heard he was interested?

A. Like I say, I eat there and we got to talking and he said he needed a gun for protection, and I said, well, we got fellows that have been around the house, broke into the car once, and I am going to try to get myself one, if I do, I'll try to pick you one up, and he said all right.

Q. But you already had a gun, didn't you? A. No, sir.

Q. You had that Derringer?

A. Oh, that—I didn't even know how to open that thing.

Q. It was a gun? A. Yes, sir.

Q. What caliber? A. I don't know, sir.

Q. Did you ever shoot it? A. No, sir, I didn't even know how to open it. It was only about this big.

Q. Well, a Derringer is a weapon, you can shoot people [fol. 75] with it. A. I guess.

Q. Why did you figure you didn't want the Derringer, you wanted a different one?

A. I didn't know anything about that.

Q. You didn't know anything about this———

A. I knew if you'd pull the trigger it would shoot. That other one, I didn't know anything about that.

Q. What did you know about guns? A. Nothing.

Q. Why didn't you learn to shoot the one you had, instead of getting a different gun—you had the Derringer quite some time? A. Three years, or more.

Q. Was it ever loaded?

A. I put it away, it was a little collector's item.

Q. How did you get it?

A. Somebody gave me that. It's been three years or so more ago.

Q. Now, the guns you got from Lewis' place, there was three of them, wasn't there? A. Yes, sir.

Q. The first time you went with Joe Costello, when you and he looked at the catalog, is that right?

A. I went in and looked, and I was in there about ten

minutes and he came in and said he was in a hurry, let's [fol. 76] get going.

Q. He looked at the catalog? A. Yes, sir, I asked him to.

Q. And the second time you came by yourself, and Lewis had some guns there that you didn't take? A. They wasn't like the ones I had looked at.

Q. The second time you went there he had some guns he wanted to deliver to you? A. Yes, sir.

Q. But you wouldn't take them. During that time you were there, didn't you make a phone call?

A. I don't know, I've been trying to think, I still don't remember.

Q. Would it help your recollection if the phone company's records showed the Ace Cab Company's office was called that time? A. I don't remember, sir, if I did.

Q. I say would it help your memory if the phone company's records showed that Ace Cab Company was called?

A. I don't know if it would or not.

Q. But whatever guns he had there, you didn't take them? A. No, sir.

Q. Why not?

A. They wasn't the ones he showed me in the book.

Q. What was different about it?

A. It seemed like this one had a thing you press on the [fol. 77] back of the handle—I mean it was different—it seemed like it had a thing on the back of the handle.

Q. Was it the same manufacturer's name, Smith and Wesson? A. I don't know.

Q. What was the thing about the back of the handle?

A. It looked like it had a bigger handle on the back—it looked like it was much——

Q. A bigger gun than you wanted?

A. Well, it wasn't the right one I had looked at. It seemed much bigger, and I told him no, it wasn't the ones I ordered, and he said you'll have to wait for them.

Q. Then you went away and when you came back the next time he called you, is that right? A. Yes, sir.

Q. How long a time was it from the time that he had the wrong guns, until the time he had the right ones that you accepted?

A. Must have been a week or ten days, I don't remember the exact time.

Q. And when the right guns came in, tell me what they were. A. Little Chiefs, about so big, 38.

Q. About as long as the palm of your hand?

A. Maybe—yes, about so big.

Q. And did you pay for them then? A. Yes, sir.

Q. And you signed a register that he had there for the [fol. 78] purpose? A. Yes, sir.

Q. And took the guns away with you? A. Yes, sir.

Q. When you got the guns, were they loaded or unloaded?

A. There wasn't no shells in them.

Q. Did you buy any ammunition from Mr. Lewis?

A. No, sir.

Q. Did you ever buy any ammunition for those guns?

A. No, sir.

Q. Do you know what caliber those guns are? A. A .38.

Q. Did you have .38 caliber ammunition?

A. I had—it seems like I had some shells around there.

Q. It seems like you had some shells—explain that.

A. I had some old shells around the house, I know.

Q. Old shells, how long had you had those old shells?

A. I don't know.

Q. For what purpose had you acquired those shells?

A. I don't remember where I got them.

Q. You didn't have a .38 gun? A. No, sir.

Q. What cartridge did you——

A. It seemed like there was a bunch of shells the kid used for a shot-gun when he went hunting on the father-in-law's farm.

[fol. 79] Q. What kid? A. My son.

Q. You mean the ten-year-old boy?

A. No, sir, I have got two in the Navy.

Q. An older boy? A. Yes, sir.

Q. You can't shoot a .38 caliber bullet in the shotgun, can you?

A. I don't think so, sir. He used a big paper shell about this big, about that long, in the shotgun.

Q. Let's find out about the .38 cartridges, where you got them.

A. It seemed like it was mixed up in the shells the kid had, I don't remember.

Q. You mean to say you got the .38 cartridges from one of your sons?

A. It was in a bunch of stuff we had downstairs, if I remember right.

Q. How long had you had it? A. I don't remember.

Q. What is the least amount of time you could have had it? A. Maybe a year.

Q. A year or more? A. About a year, I would say.

[fol. 80] Q. At least a year? A. I would say so.

Q. You don't know where it came from? A. No, sir.

Q. How did you know it fit?

A. Because it fit in the thing.

Q. You tried it out to see? A. Yes, sir.

Q. You had the gun and you tried to see if any of the old ammunition fitted? A. Yes, sir.

Q. And it turned out it did fit? A. Yes, sir.

Q. Did you ever fire that gun? A. No, sir.

Q. All right, let's go back to the time you came from Lewis', you left Lewis' with the three guns; what did you do?

A. I brought them back and took one over to Charley Klaich.

Q. That same day?

A. Yes, sir, and the other one I took out to Price.

Q. To the apartment? A. Yes, sir.

Q. Was he there when you got there A. Yes, sir.

Q. What time of day was it?

A. It was in the afternoon some time, I'm almost sure it was.

[fol. 81] Q. What did you do with the third gun?

A. The third one I put in the cab and took it home that night.

Q. Then what did you do with it?

A. I put it in the top of the closet and the wife kept raising the devil, she was scared of that thing around there.

Q. When did she say that, the same day?

A. I don't remember—no, I think it was later on, she got thinking about the little one around.

Q. Where did you put the three guns, where did you put them when you came from the gun shop, in the glove compartment? A. No, on the seat.

Q. And you delivered two and you kept the other one, kept it laying on the seat of the cab?

A. I did, and I went on home then. It was toward evening, I think the baby was home from school. I don't re-

member if he was there or if I got there before, but I put it up on the top of the shelf in the closet.

Q. You took the gun out of the cab and walked in the house and immediately put it in the closet? A. Yes, sir.

Q. The only time you handled it was to take it from the cab inside the house and put it on the shelf, is that right?

A. Yes, sir.

Q. What did you do then? A. I left it there.

[fol. 82] Q. From the time you put it up there to the time you put it in Costello's Cadillac?

A. I took it out and cleaned it out and cleaned the oil and stuff, and then I got looking for the old shells.

Q. When did you take it out and clean it and oil it?

A. I don't remember, it might have been a day or so.

Q. Is that when you loaded it?

A. I put some shells in that day to see if they fit.

Q. These were the shells you had a year or more?

A. It seemed like I did.

Q. You don't know where they came from?

A. It was in a bunch of old stuff we had downstairs. There were some .22's there.

Q. Do you remember where the .22's came from?

A. No, sir, I don't.

Q. Would you say you had all that stuff a year or more?

A. I imagine so.

Q. How do you fix that time?

A. I don't know, I say it could have been about a year, I don't remember.

Q. Could it have been much less or more than a year?

A. I don't know.

Q. If it was within a year you would remember where you got them? A. I don't know whether I could or not.

[fol. 83] Q. You never bought any cartridges? A. No, sir.

Q. These were old ones? A. They were old ones.

Q. You never tried to fire them to see if they were good?

A. No, sir.

Q. Those same cartridges were in there when you put the gun in Costello's Cadillac, is that right?

A. I don't—I'm trying to think if I took them out or not.

Q. If you took them out did you put in any different ones?

A. I don't think I did. I don't know if I took them out, I wouldn't have had no other ones.

Q. So it would have been these in there if there was cartridges in there, is that right? A. Most likely it would.

Q. Now since you were here last, who have you discussed this case—since you were here last, who have you talked to this about? A. No one, other than my wife.

Q. Have you talked to Joe Costello?

A. No, sir, we moved the next day when I was down here.

Q. Your moving doesn't have anything to do with the investigation?

A. No, I haven't worked. I worked Wednesday of that week, then I haven't worked since then because the wife [fol. 84] has been sick, and we moved then and I straightened out the house with her.

Q. Do you mind telling us when you first planned this move?

A. We have been trying to buy a house for quite some time. Then over a month, I guess, a fellow found a place for us.

Q. And this house you moved to is one you bought, is that right? A. Yes, sir.

Q. When did you close the deal?

A. It's been a couple of weeks, I guess, or more.

Q. Who did you buy it through?

A. Charles Vatterott on St. Charles Rock Road, in St. Ann's, and that's about ten thousand west, or eleven thousand west.

Q. At the time you closed the deal did you make whatever payment was necessary to close the deal?

A. Yes, because he had told us ahead of time—it was going to be an amount, so we had—I don't know, maybe two, two hundred and fifty dollars saved up, so we left a few bills go in order to accumulate enough to make the down payment.

Q. Have you made additional payments since then?

A. No, sir.

Q. When did your first payment come due?

A. The first of the month.

Q. Next week? A. The first of May, yes.

Q. You're buying it on monthly payments, are you? [fol. 85] A. Oh, yes, see, he gives us a break on the house, we got it for five hundred dollars down

Q. And you made that payment a couple of weeks ago?

A. The down payment?

Q. Yes.

A. It was on the closing date I give him the money. If I remember right, I think it was on the closing day.

Q. You haven't paid any since then on the house?

A. No, sir.

Q. Now, where did you go this morning before you came here?

A. The bakery shop, and then took the baby to school, and then I went down the office, down the Ace Cab Company office.

Q. Who all was there?

A. Gosh, a lot of people, Joe, Joe Costello, Mr. Mueth, and——

Q. Al Price, was he there, or Jim Price, whatever his name is?

A. He came in after I was there, and Bill Laird, a couple of colored boys was there and went and got coffee for us.

Q. Did you talk to Price about this subpoena?

A. No, sir.

Q. Did you overhear Price and Costello talking about it?

A. I was out in the big office, Costello's got a small office.

Q. Was Price in there with him? A. He went in, yes.

[fol. 86] Q. You didn't go in there? A. No, sir.

Q. You don't know what happened inside? A. No, sir.

Q. Was Klaich there? A. No, sir.

Q. He never did show up? A. I didn't see him.

Q. Did you recognize any lawyers that you know this morning? A. No, sir.

Q. Who was the man you say represented you when you made a statement? A. Bardgett.

Q. Can you spell his name? A. B-a-r-g-e-t-t.

Q. Bargett, was he there this morning? A. No, sir.

Q. Do you know Harry Arnold? A. No, sir, I don't know him.

Q. You're not acquainted with a man named Harry Arnold? A. No, sir.

Q. Do you know Bud Walsh? A. Yes, sir.

Q. Was he there? A. No, sir.

[fol. 87] When is the last time you saw Walsh?

A. Could be a couple of month, sir, I don't remember.

Q. In what connection did you him then?

A. I think I seen him driving his car, and I passed him and I waved at him.

Q. Have you seen him in a business way at any time recently? A. No. sir.

Q. Now, every time you went to Lewis' Gun Shop, did you have that hundred and seventy five dollars with you, did you have it the first time you went? A. No, sir.

Q. Did you have it the second time you went?

A. Yes, sir.

Q. And when you didn't take delivery on the guns, what did you do with the money?

A. I took it back and put it in an envelope and asked Mr. Mueth to put it in the safe for me.

Q. Did you seal the envelope? A. Yes, sir.

Q. Do you remember what kind of envelope it was?

A. A white one, about so big.

Q. Did it have the company name on it, or any kind of printing? A. I don't remember, sir.

Mr. Boecker: Mr. Zilliken, does any one have any questions?

[fol. 88] A Juror: I thought I understood you to say that you visited with the second person that you bought the gun for in the morning around eleven o'clock, and today you said in the afternoon. A. I don't understand.

A Juror: This second person that bought a gun, not the restaurant owner—Price, I understood you to say you visited him about eleven o'clock in your first testimony, and today you said you visited him in the afternoon.

A. I took the gun back in the afternoon, I brought the gun back in the afternoon.

A Juror: You took the gun to him in the afternoon? I thought your first testimony said around eleven or twelve o'clock. A. Not that I remember.

A Juror: You said you had two boys in the Navy?

A. Yes, sir.

A Juror: How frequently do they get home?

A. The one was just home. He had been in the Pacific for nine months, and he was home twenty days; and the other one is in boot training, he just went up.

A Juror: How many children do you have, altogether?

A. Five, sir. This lady I married, she had two children.

Q. (By Mr. Boecker) Now, you told us the last time—excuse me, did I interrupt you?

The Foreman: No, I had nothing.

[fol. 89] Q. (By Mr. Boecker) Mr. Carmella, the last time you were here you told us that you took the gun from your home and carried it in your cab, do you remember that? A. I put it in there on a Saturday, yes, sir.

Q. That would be February 25th of this year?

A. Yes, sir.

Q. When do you say you transferred that gun to Costello's Cadillac?

A. Sunday, sir, when I took his car, which was the following day.

Q. Now, did you leave your house with your cab, and leave it at the lot and pick up the Cadillac?

A. Yes, I left the house with my cab.

Q. When you got to the lot, where did you park?

A. I parked up—we have a garage there, and got a wash rack and radio and lubrication, and I parked it on the side there.

Q. And where was the Cadillac, was it there?

A. It was around the back of the garage.

Q. Did anybody see you transfer this gun from one car to the other? A. I don't know, sir.

Q. What was your purpose in putting the gun in the Cadillac? A. I was going to take it home.

Q. What? A. The gun—I hadn't seen that fellow I was supposed to see, and I didn't want to carry it around, so [fol. 90] I was going to take it on home.

Q. I thought you expected to see the fellow while you were—I understood that you put this gun in the Cadillac because you expected to see that fellow?

A. I was going to take it home.

Q. How long had you been carrying it around in the cab looking for a fellow to buy it? A. I looked for it Saturday.

Q. Did you put it in your cab Saturday? A. Yes, sir.

Q. Did you look all day Saturday?

A. Yes, I worked to what time I got home—I imagine it was about five o'clock when I got home Saturday.

Q. When had you seen that man before this?

A. It was just a day or two before that.

Q. What did you say his name was?

A. Johnny something—I can't remember his last name.

Q. He was driving an Ace cab? Yes, sir.

Q. Outside the Jefferson Hotel?

A. That's where I talked to him, yes, sir.

Q. Since you were here last, you have gone with the F. B. I. to the Department of Streets and Sewers at City Hall and you have seen a lot of pictures of taxi drivers? [fol. 91] A. Yes, sir.

Q. Did you see Johnny? A. I looked through all of them.

Q. Your picture is on file over there, too, isn't it?

A. Yes, sir.

Q. Every taxi driver has to have his picture on file over in the City Hall in St. Louis? A. Yes, sir.

Q. This Johnny is a taxi driver and you were looking for his picture?

A. Yes, sir, if I could remember, I guess we must have went through a few thousand.

Q. And you didn't find his picture?

A. I couldn't see him, sir.

Mr. Boecker: Any further questions?

The Foreman: No, sir.

Mr. Boecker: Will you wait outside, please?

(Witness excused.)

[fol. 92] EARL LEWIS testified as follows:

Direct Examination, by Mr. Boecker.

I am in the wholesale gasoline and gun business. My gun business was at 2323 Madison Avenue, Granite City, for eighteen years prior to October, 1956. During that time I have seen the defendant, Joseph Costello, in my place of [fol. 93] business. I definitely saw him there on one occasion and possibly as many as three occasions.

Mr. Shenker: I will ask that that possibly, about possibly three times be stricken from the record.

The Court: Overruled. Proceed.

I did not know the gentleman's name was Costello until later. Harry Arnold had ordered a gun and Mr. Costello

and Joe Cannella, I believe, came over and I thought they came to pick Arnold's gun up, but they said they did not know anything about it.

Mr. London: I object to what he thought.

The Court: Sustained.

I thought they came after a gun that somebody else ordered and I showed it to them and they said they did not know anything about it.

Mr. London I renew the objection.

The Court: Overruled.

Q. Mr. Boecker: What else happened in that shop that day with those men? A. Well, they talked guns.

Mr. Shenker: Well, I am going to object to that, if the Court please.

The Court: Sustained.

During this visit I did not show either of the gentlemen a gun catalogue. I can't recall if any business was transacted since it has been over two and one-half years ago. I cannot recall what Mr. Costello said to me on the subject of guns. I don't recall how long they were in the establishment on that occasion. It was not too long. I believe they arrived at my establishment in a powder-blue Cadillac.

On another occasion Joe Cannella came into my place and ordered a gun on that day, he arrived in an Ace Cab. [fol. 94] On that occasion Mr. Cannella ordered three guns. I cannot recall any other occasion when Mr. Cannella came in a powder-blue Cadillac. On another occasion, however, somebody did come and take a catalogue and walk across the street to the powder-blue Cadillac, but it was not Joe Cannella.

Q. Mr. Boecker: It was somebody else that day?

Mr. Shenker: I will ask that that be stricken, if the Court please; certainly not responsive to the question.

The Court: Sustained.

Government's Exhibit 2 came out of my book. It is part of the records of my business. When we buy a gun we put it down and the date and when we sell it and

usually the price, and when we sell it we have the man sign his own name and usually I will put the particular make of it, the number and the serial number. This record is kept in the regular course of business of each transaction of a gun.

On Exhibit 2 there is the record of three guns that were delivered to the defendant, Joseph Cannella. They are the Chief .38 Smith Number 68897, and another Smith & Wesson .38 Chief 69436; and the third one S&W .38 Chief 65965, and they are sold for $178.80. That was on December 22.

Mr. Shenker: We will object to that testimony, if the Court please, so far as the defendant Costello is concerned, on the ground it is purely hearsay, not binding on the defendant, irrelevant and immaterial.

Mr. Boecker: It is offered subject to connecting up, Your Honor.

The Court: Overruled. Accepted on that promise.

Mr. Cannella picked the guns up on December 22, 1955.

[fol. 95] Q. Mr. Boecker: Now can you relate the occasion on which those guns were ordered.

A. They were ordered through——

Q. No, I mean when you received an order from a customer.

A. I can't recall the exact date because these were slow in getting here, and it was kind of a—another fellow ordered them over the telephone for them and it took a long time for them to get here, and later on Cannella came over and he, let's see—we could not get them, that is the way it was.

Guns were ordered on the telephone which I did not get. Later Mr. Cannella came over and ordered guns. When he came over and ordered them he was using an Ace Cab.

Q. May I direct your attention to a written statement you gave to the FBI on April 10th of last year, Mr. Lewis; do you recall making such a statement?

* * *

Mr. Boecker: I claim surprise, Your Honor, again, and ask to have an opportunity to rehabilitate the witness's recollection.

Mr. Shenker: I am going to submit, if the Court please, this is certainly incompetent and highly improper to proceed in that manner. It is highly prejudicial to just attempt because they have a statement that was taken some months ago allegedly to come in now and proceed to say, and to say that they are claiming surprise. There are certainly many other ways and means that a person who is preparing a case to use so that when he comes into a courtroom he cannot claim surprise. The Court is well aware of it.

[fol. 96] Mr. London: I join in Mr. Shenker's objection.

The Court: Overruled. You may proceed, Mr. Boecker, proceed along the lines suggested.

Q. Mr. Boecker: Mr. Lewis, I do not want to put words in your mouth. Let me ask you if you recall making a statement that, in connection with the order of these guns you received a visit from a man in a powder-blue Cadillac, that is in connection with the order which eventually resulted in this delivery, is that or is that not correct?

Mr. Shenker: I certainly object to that. That is highly leading and suggestive, calls for a conclusion, and introduction of this testimony by Mr. Boecker rather than this witness. Furthermore, they cannot substitute this statement for testimony.

Mr. Boecker: I am trying to avoid putting any words in the witness's mouth, Your Honor.

Mr. London: Same objection.

The Court: Overruled. You may answer.

A. We did not know who those guns went to. * * *

Q. Mr. Boecker: Perhaps I do not make myself clear, Mr. Lewis. I say, without wanting to put any words in your mouth, do you recall whether you made any statement that in the negotiations leading up to the sale of these guns you had a visit from a man in a powder-blue Cadillac?

Mr. Shenker: That certainly calls for a conclusion.

Mr. Boecker: I am not suggesting who it was.

The Court: The Court has ruled you may answer.

A. Well, I can't recall whether it was before or after. No, I can't give you no good answer on that.

* * *

Q. Mr. Boecker: Do you recall making a statement for Mr. Bush and Mr. Kennedy who introduced themselves as FBI agents in——

A. We talked, yes, but it might have been pertaining to the catalogue that was taken across the street.

Q. Yes. Now, without me putting any words in your mouth, will you relate that episode that you have in mind right there?

[fol. 97] A. Well, on one deal I got the wrong guns and——

The Court: On one deal with whom?

The Witness: With this Harry Arnold, and they wanted Chiefs, I think, or they wanted Chiefs and I got .32 Handy Ejectors, that I admired. I thought that would be a good gun and that they would take them.

* * *

And I got the wrong guns and when they, a little fellow, came across the street and looked at the guns, and said—and he said they did not want those, then they took the catalogue across the street, they wanted the Chiefs only, not those little ones.

Q. Who was that on that occasion, can you identify him?

A. I never saw this gentleman before, he was small.

Q. Came in a powder-blue Cadillac?

A. He just walked across the street and got the catalogue, and went back. He said no, they want Chiefs.

Mr. Shenker: I ask at this time that all this testimony pertaining to this, if the Court please, be stricken from the record on the ground of being indefinite, uncertain and certainly does not tend to prove or disprove anything as far as the defendant Costello is concerned, or either of the defendants.

Mr. London: Same objection.

The Court: I do not think it is identified who it is he is dealing with.

Q. Mr. Boecker: Let me ask one more question: on that occasion was an order placed which resulted in the delivery of these three guns? A. No, not that day.

Q. What was done on that day?

A. Well, the order was already in for Harry Arnold: [fol. 98] Q. The order for these three guns?

A. I got the wrong ones and then we could not get those. It took so long to order them from Leacock's that the day that Cannella came over we reordered from Sutcliffe in Kentucky and got them in a few days.

The day that the man came in and took the catalogue across to the powder-blue Cadillac I would not know whether that was related to this order or was a different order for guns.

Q. When you got the guns which were delivered to Mr. Cannella how did you let him know, or let somebody know, that the guns had arrived?

A. This Joe left me a name to call Joe and a telephone number and when the guns did come from Sutcliffe Company in Kentucky I called this here—I says—do you want me to go through with it. * * * I asked for Joe. They said, "Joe who"? I said, "I don't know, just the Joe that knows Lewis over in Granite City." So pretty soon they put the Joe that knowed Lewis in Granite City on and I says, "This is Lewis". He said, "Yes, Lewis" and I says, "Well, I got what you ordered". So he came over and got them.

Cannella got these three guns whose numbers I read off. I do not recall the number in St. Louis that I called. I had never called it before and had no idea where it was. I had written the number down. Government's Exhibit 3 is a little torn piece of paper with the notation of the number to call. The number on Exhibit 3 is Main 1-8495. That notation was given when Cannella in the Ace Cafe was there.

When I placed the call, the party at the other end did [fol. 99] not identify the place at which the phone was located. I cannot recall exactly how the phone was answered. I called MAin 1-8495 and asked for Joe. I wanted Joe that knew Lewis and I talked to him.

Subsequently Joe Cannella came over and picked up the guns. He signed the name Joe Overbeck. I told him either he or the others would have to have a legitimate name on my records and he signed the name Joe Overbeck and he wrote the address which appears here, 4186 Kingshighway. At the time I understood his name to be [fol. 100] Overbeck. I first learned his name to be Cannella a year ago here in Court at the first hearing. I am sorry, we learned it later when we looked for chauffeur's licenses.

On one occasion as I have stated, Joe Costello and Joe Cannella were in my place of business together. I cannot recall when that was except that at the time I thought they were to pick up the gun Arnold had ordered and I showed it to them and they said they knew nothing about it. When I saw Costello on that occasion I could not recall ever having seen him before. The only time I have seen him since then is in the courtroom here a year ago and in the papers. It is the same Joe Costello here today.

* * *

Mr. Boecker: At this time I would like to offer into evidence Government's Exhibit 2, being the original business record identified by the witness as recording the sale of the three guns including the two mentioned in the indictment, and the notation bearing the number that he called to effectuate delivery of these guns, that being Exhibit 3.

Mr. Shenker: We will object to it as far as defendant Costello is concerned, on the ground no foundation was laid for its introduction, incompetent, irrelevant, immaterial and self-serving.

Mr. London: Same objection for the defendant Cannella, it is too remote, it does not tend to prove or disprove any of [fol. 101] the issues in this case.

The Court: I thought we had already stipulated in the record that the objections of one party would go to the other.

Mr. London: I just wanted to add that one part.

* * *

Mr. Boecker: Exhibit 2 is the business record of the witness recording the delivery of the two guns mentioned in the indictment, and the third one he said was delivered at the same time.

The Court: Very well.

Mr. Boecker: Exhibit 3 is the notation he made of the number he was to call when the guns arrived.

The Court: Objection overruled. Proceed.

(Government's Exhibits Nos. 2 and 3 received in evidence.)

Government's Exhibit 4 is a gun bearing number 65965 which is one of the guns that I delivered to Mr. Cannella. Government's Exhibit 5 is a gun bearing the number 69436 which is one of the guns I delivered to Mr. Cannella on December 22, 1955. Government's Exhibit 6 is a gun bearing the number 68837, rather 68897, which is one of the guns I delivered to Mr. Cannella on December 22, 1955.

I did not furnish any ammunition for any of these guns. These guns were delivered to Mr. Cannella in the State of Illinois. These guns are called a Chief Special, Smith and Wesson Chief Special, being .38 caliber.

Mr. Boecker: I would like at this time to offer into evidence Government's Exhibits 4, 5 and 6.

[fol. 102] Mr. Shenker: At this time, if it please the Court, we are going to object to the introduction of all of the exhibits for the reason that so far as defendant Costello is concerned they are totally incompetent, irrelevant and immaterial to points at issue in this case, do not tend to prove or disprove any of the allegations, no foundation was laid for the introduction, they are hearsay as far as the defendant is concerned. I further want to object to their introduction on the ground that the very nature and basis of this prosecution was the result of an arrest which was made by police officers in St. Louis and which arrest was held to be unlawful and the charge—and that Government's Exhibit 6, which was identified as 68897, is one of the exhibits which was allegedly taken from an automobile that was operated by Mr. Costello at the time of

his arrest, and we submit that would be illegal, incompetent, in violation of the defendant's constitutional rights.

The Court: Objection of both defendants overruled.

Cross-Examination, by Mr. Shenker.

I had a Federal permit to sell guns. The party to whom I sold these guns put the name down Joe Overbeck which I later learned was Joe Cannella, the man seated in the courtroom today. He was in a taxicab when he picked them up. I don't think it was an Ace cab when he picked them up. He ordered them when he was in a taxicab. Actually I don't know what he was in when he picked the guns up. He was alone when he picked the guns up When Mr. Cannella ordered the guns and gave me a telephone number to call, I do not recall whether he wrote the number down or whether I wrote it down. The handwriting on Government's Exhibit 3 does not look like my handwriting. I do not think that that is my handwriting.

I turned over the piece of paper identified as Government's Exhibit 3 to the FBI. It was in my filling station when I turned it over to them. I had it in the top of my desk. I turned it over to the FBI some months after I sold these guns.

When I called the number I did not ask for Joe, the supervisor. I just asked for Joe. I did not know to whom [fol. 103] I was talking. It took some time before I got the Joe that I wanted. I might have talked to several people before they located the Joe that I wanted. When I finally got the right party it was Joe Cannella, the same man that came over to pick up the guns. He signed the name Joe Overbeck. I did not tell him he could sign any name he wanted to, just so he signed a name. I told him he had to put his right name down. I did not ask him for any identification. We usually know who we are dealing with but these were first ordered by Harry Arnold and anybody that would buy them would be his, they would be for Harry Arnold. I did not charge them out to Harry Arnold. I did not ask for any identification.

The numbers on Government's Exhibit 3 looks like my handwriting but the name "Joe" does not look like my handwriting. I did not put down the number 4186 Kingshighway at the same place where the name Joe Overbeck appears.

Cross-Examination, by Mr. London.

Mr. Cannella came over to my shop on two occasions. When he came to see about the guns he was driving an Ace Cab. While he was in the shop I had no discussion with him as to who he was or what his name was.

Q. Mr. London: Is your testimony then, Mr. Lewis, that he placed an order for these guns and you ordered these guns and you called him to pick them up but you did not know who he was, is that correct?

A. They were already ordered by Harry Arnold and this order was old and the Leacocks could not produce them so we re-ordered them that day from the Sutcliffe Company in Kentucky.

Q. And when you called this number that day you did not know who you were calling, is that correct?

A. Called Joe.

Q. Yes.

A. I knew that was the man that ordered the guns.

Q. But you did not know who he was.

A. I don't know only that he was Joe Overbeck.

Q. You say you knew he was Joe Overbeck? A. Yes.

[fol. 104] Q. How did you know that?

A. Oh, no, no. I am wrong. I didn't know that was his name until later.

HOWARD C. KENNEDY testified as follows:

Direct Examination, by Mr. Boecker.

My name is Howard C. Kennedy. I am a Special Agent of the Federal Bureau of Investigation. Government's Exhibit 4 is the same gun that I handed to Mr. Boecker earlier this morning. I obtained Government's Exhibit 4 from Charles Daniel Klaich at 2100 Clark Street in St. Louis. That is his business address, Klaich's Tavern. That is the same Charles Klaich who is sitting in the witness room. I received this gun from Mr. Klaich on April 18, 1956. I asked him for the gun and he gave it to me.

CHARLES KLAICH testified as follows:

Direct Examination, by Mr. Boecker.

My name is Charles Klaich. I live at 2100 Clark Avenue and I also have a business at that address which is a tavern and restaurant. I am acquainted with defendant, Joseph Costello. I had a conversation with Mr. Costello in his office but the conversation was not directly about guns. I am pretty sure the conversation took place in December, 1955. His office is on Washington Avenue around Eighteenth Street.

Q. What in substance was your conversation with Mr. Costello on that occasion?

Mr. London: That is objected to as to defendant Cannella, irrelevant, immaterial, hearsay.

Mr. Boecker: Subject to connecting it up.

The Court: He may answer subject to the promise.

A. I was inquiring about his car in connection with mine, and the conversation, we were talking about the business in the whole, and we started talking about the neighborhood, and the place, and that was what the conversation was really about.

Mr. Costello opened a desk drawer and took something out and I thought I saw a gun. To me it looked like a [fol. 105] gun. He later closed the drawer and I said I would like to have one of those for my place of business. Mr. Costello said they were hard to get. The gun was a pistol but I could not tell whether it was an automatic or what it was. It was a small hand gun.

Thereafter I obtained a .38 caliber pistol. There was a conversation in my tavern about holdups in the neighborhood and Mr. Cannella was there at the time. That was subsequent to my conversation with Mr. Costello. It was probably a week or two after that conversation. Cannella said he might be able to get me a gun and I said that would be fine. Subsequently Mr. Cannella came in and said he could get me a gun and that it would cost either sixty-five or sixty-nine dollars and I gave him seven ten-dollar bills. That was several days after our conversation. I am pretty sure it was still in the month of December. Later Mr. Cannella came and said he could not get the

kind of gun I wanted. I told him to keep the money and when he gets one to bring it in. Not long after that he brought in a .38 revolver in a box.

Government's Exhibit 4 is the gun that I had and it is the gun that I turned over to FBI Agent Howard Kennedy.

Cross-Examination, by Mr. Shenker.

Mr. Costello never told me that he would get me a gun or would have anyone get a gun for me.

I knew Mr. Cannella. He has come into my place. My discussion about the gun with Mr. Cannella was not related to the discussion that I have had with Mr. Costello. Mr. Costello's name was not mentioned in my conversation with Mr. Cannella. My conversation with Mr. Cannella was about some robberies in the neighborhood and he said he thought he could get me a gun for sixty-five or sixty-nine dollars. I gave him seventy dollars, he later said that he could not get the gun at that time that I wanted. I told him to keep the money until he was able to get it, which he did, and I subsequently got a gun. Government's Exhibit 4, the gun I turned over to Mr. Kennedy of the FBI, is the gun that I got from Mr. Cannella.

[fol. 106] Redirect Examination, by Mr. Boecker.

I do not recall having any conversation with Mr. Costello about the fact that I had given Cannella any money. I remember giving a statement on April 19 of last year to the Federal Bureau of Investigation.

Mr. Shenker: I am going to object to any questions about any statement. It is ex parte proceedings, if the Court please, and that is certainly not binding on the defendant and improper examination of the Government's witness.

The Court: He may answer.

Q. Mr. Boecker: Do you recall giving such a statement?

I don't remember exactly if I did, sir. I mean if I did, I gave it.

The Court: You mean what?

The Witness: I mean if I made the statement I don't remember right now.

Q. Mr. Boecker: All I am asking is if you remember giving a statement, a narrative of events to these two agents.

The Court: Just a minute. Don't you remember whether you gave a statement?

The Witness: Yes, sir, I gave them a statement, yes, sir.

Q. Mr. Boecker: At that time did you give them a true account of what you recollected?

Mr. Shenker: Just a minute. I object to that on the ground it is certainly incompetent, irrelevant and immaterial; and it is an attempt to get something into evidence by indirection which they cannot and should not do directly.

The Court: Overruled.

* * *

A. Yes, sir. I believe I did. * * *

The statement was read to me. I believe I read it too. [fol. 107] I believe I signed it and initialed each page.

Q. Would it help your recollection to see what you signed on that occasion, Mr. Klaich? A. Yes, sir.

Mr. Boecker: I would like to have the witness have an opportunity to identify his signature and initials and refer to this report.

Mr. Shenker: We are going to object to it, if the Court please, improper examination.

The Court: Overruled.

Mr. Shenker: This is re-direct examination after they finished with the witness.

Q. Mr. Boecker: Mr. Klaich, does that help you recollect as to whether or not you had a conversation with Joe Costello about the fact that you had given your money to Cannella?

Mr. Shenker: I am going to object to the form of the question, if the Court please. It is leading and suggestive, an attempt to impeach and cross-examine his own witness.

The Court: Sustained.

Q. Mr. Boeker: Let me repeat the question I asked you earlier, Mr. Klaich. Do you recall whether or not you had a conversation with Mr. Costello relating to the fact that you had given money to Cannella?

Mr. London: I object to that as to the defendant Cannella, it would be hearsay, totally irrelevant, incompetent, not tend to prove or disprove any issue in this case.

The Court: Overruled.

Q. Mr. Boecker: Do you recall?

A. I believe I did.

Q. And when was that conversation?

A. As I said in the statement there, probably about ten days passed I did not see Mr. Cannella.

Q. And what did you say to Mr. Costello on the subject?

A. If I remember correctly, by that statement, I saw Mr. Costello, I said I had given Cannella some money and [fol. 108] I said I have not seen him.

Q. What, if anything, did Mr. Costello say?

A. Well, I believe he left, came back and said don't worry about it. It is locked in the safe.

* * *

Mr. Shenker: I am going to ask that the question and answer be stricken, if the Court please, on the ground it is purely hearsay, not binding on any of the defendants and for the further reason——

The Court: Not binding on any of them?

Mr. Shenker: I beg your pardon, Your Honor.

The Court: Who did he say made that statement?

Mr. Shenker: He says according to this statement he says he told Mr. Costello he gave Cannella some money and he had not seen him for about ten days.

[fol. 109] The Court: Yes, and what else?

Mr. Shenker: And that he says Mr. Costello told him, don't worry about it, the money is locked in the safe. I do not see where that has any relevancy or any materiality. It is an improper attempt by the Government to impeach their own witness, and it is an improper attempt by innuendo and by inference to get in evidence which is

totally incompetent, irrelevant and immaterial to the point at issue.

* * *

The Court: Overruled.

* * *

Mr. Shenker: I would like at this time to have the Government produce the document which they showed to the witness, to defendants' counsel.

Mr. Boecker: I don't think it is properly part of the evidence in the case. It is the witness's statement, his evidence.

The Court: The motion is overruled. Proceed.

Mr. Shenker: Thank you. Save my exception.

* * *

The Court: Will counsel step up to the bench, please?

(There was a side bar conference between the Court and counsel, out of the hearing of the Jury, during which the following occurred:)

The Court: The Court just asked counsel to step to the bench and asked in regard to the last request made by Mr. Shenker, counsel for Costello, and the Government counsel, Assistant United States Attorney, Mr. Boecker, states that he is desirous to retreat from the position he took and let the defendants examine the * * * statement of the witness * * *

* * *

Mr. Boecker: I think we can speed it up. Go ahead and take it.

Recross-Examination, by Mr. Shenker.

Q. Mr. Klaich, if you please, sir, what kind of a car did you own, sir, in 1956? A. A 1956 Cadillac.

Q. A 1956 Cadillac? A. Yes, sir.

Q. Now, I will ask you to state if at the time you gave this statement to the FBI, if you did not tell them this, that at the time you were at Mr. Costello's office and you saw—you say he opened a drawer and you saw what looked to you like, you thought it was a gun, you would like to have one, did you or did you not say to the agent,

in the statement, "To the best of my recollection Joe said they're not easy to get?"

Mr. Boecker: Just a minute. I object to the form of the question. Mr. Shenker is apparently reading from the paper but he is not reading what the paper says.

The Court: Let me see it.

Mr. Boecker: The paper says, "I saw a pistol."

The Court: Let me see it.

Mr. Shenker: Did I say something else, Mr. Boecker?

The Court: Let me see it. I want no controversy.

Mr. Boecker: Yes you did.

Mr. Shenker (Handing paper to the Court): There is the point, right there.

The Court: You sit down and wait until I get through.

[fol. 111] Mr. Shenker: Yes, sir.

(The Court is reading the paper.)

The Court: Read me what Mr. Shenker said.

(Last question by Mr. Shenker read.)

The Court: Well, I will read you what it says here. (Reading.) Subsequent to that date, on December 7, 1955, I took my car back to the Lindburgh Cadillac Company to have some minor adjustments made, at which time I saw Joe Troup, whom I know works at the Ace Cab Company. At this time I observed Troup taking the license plates off Joe Costello's pale blue Cadillac. At this time I asked Troup if he had a ride back to the lot, and he told me no—I am reading this to get the better picture—and so I drove him back to the Ace lot. I then went into Joe Costello's office to show him my new car. While I was in Costello's private office, I observed him open the drawer to his desk, where I observed a small pistol which I think was a .38 caliber, snub-nose. After seeing this pistol, I told Joe I sure would like to have one of those because of working at nights I would like to have one to carry in my pocket on account of the neighborhood. To the best of my recollection, Joe said they're not easy to get. At this point we had no further conversation concerning the gun.

Mr. Shenker: That's all I asked him, Your Honor, whether——

The Court: You did not read that just as it appears there.

Mr. Shenker: Your Honor, I wish the record to show that I did read that because I——

The Court: I had the Reporter read what you said. I have read this so counsel and the jury can hear exactly what is in there. That is all I care to hear on that.

Mr. Shenker: I think I should make my record on it, Your Honor.

The Court: Make your record. And when you read anything and make statements here, I want them read exactly as they are, no change; and let this stay with you as long as you practice in this court, sir.

Mr. Shenker: Let the record show that counsel specifically asked the question, if he did or did not say to the agents in that statement, to the best of my recollection Joe said they're not easy to get, that that is the only part [fol. 112] which I read from the statement and which I asked this witness if he did not say that; and at this time in view of the Court's statement we will ask at this time, if the Court please, that the jury be instructed to disregard Your Honor's statement, and that a mistrial be declared.

The Court: Overruled. Proceed.

I saw Mr. Costello about a week to ten days after I gave Mr. Cannella the money and I told Costello that Cannella was to get me something but I never told him that it was to be a gun. Costello said, "Don't worry about it," and told me that it was locked in the safe.

After Mr. Costello was arrested and before I turned the gun over to Agent Kennedy I had a conversation with Mr. Costello wherein he said he did not want anybody to lie for him and that I should tell the truth. He said he wanted no one to get into trouble over him. I actually bought the gun from Joe Cannella.

Recross-Examination, by Mr. London.

When I say I bought it from Jo Cannella I mean that I gave him the money to obtain the gun.

Redirect Examination, by Mr. Boecker.

When Mr. Costello said he didn't want anybody to get in trouble over him he said that they were trying to get him on some kind of a gun deal. He said, "You bought the gun." I said, yes, sir. Mr. Cannella was there with him. He said, "Tell them the truth. You have a business to run. I don't want you to get in trouble over me." The exact words.

Recross-Examination, by Mr. Shenker.

That was after the arrest in April, 1956, about a day or two before Agent Kennedy came in to take me down.

FRANK BURNS testified as follows:

Direct Examination, by Mr. Boecker.

[fol. 113] I am a Detective Sergeant in the St. Louis Police Department and have been with the department approximately twelve years. Government's Exhibit 5 is the same gun that was in my possession earlier this morning. I obtained this gun at the home of James Price, 5762 Kingsbury, on May 1, 1956.

I went to Mr. Price's home on official business with my partner, Joseph Spies. We went there at ten-thirty a. m. Mr. Price lived in an apartment building. I am not certain how many families lived in the building. Mr. Price lived on the first floor. We were admitted into the apartment by a man and there was no one else in the apartment during the time we were there. He turned the pistol over to us while we were there. The gun was unloaded and I observed no ammunition in the apartment.

Cross-Examination, by Mr. Shenker.

Mr. Price has been in the tavern business. At that time I believe his tavern was located at 4425 Olive. I went to his home on May 1, 1956, and not to his tavern. I kept the

gun that he gave me under my control at all times. I did not turn it over to the FBI agents. The best that I recall is I turned it over to our police laboratory. Somebody else may have observed the gun but I did not turn it over to anybody else. When I came to Court I got the gun from the police laboratory.

* * *

[fol. 114] (There was a side bar conference between the Court and counsel out of the hearing of the Jury, during which the following occurred:)

Mr. Shenker: If the Court please, objecting further to the comments and the objection that was made by Mr. Boecker at the time that I cross-examined witness Klaich on the statement that he made, and to the comment that was made by the Court, we are again repeating my request that a mistrial be declared. This is on the ground because the Court's reading the statement and the Court's statement to the jury, and the Court's admonition of counsel for defendant Costello, was of such a nature that it conveyed to the jury the idea that counsel for Costello was not fair and honorable in conducting the defense of this case, and that he purposely did something which is improper and unlawful in the cross-examination of that witness, and that the Court's admonition of counsel was of such a nature that it held counsel for the defendant up to and in a very unfavorable and improper light before the jury to a point where it impaired the ability of counsel for the defendant, Joe Costello, to continue with the defense of the case, and impaired the ability of counsel for defendant to properly represent defendant Costello, before the jury, and the jury would be, would certainly not be as inclined to accord counsel for defendant, Costello, the same type of consideration that the defendant is entitled to have his lawyer receive before the jury before whom this case is being considered.

The Court: Mr. Boecker, the Court would like to ask you whether the Court's statement, if the Court in the statement he made, the caution I gave to defendant Costello's counsel, Mr. Shenker, said anything that was not in accordance with what had happened. Did the Court say anything that was not justified by the record, in your mind?

Mr. Boecker: I submit that the Court's action was justified; and I would like the record to show my objection, and I think the Court's admonition was based on the observation that while Mr. Shenker was apparently reading he was weaving in language that was not in the writing, my observation appeared to be he was reading from the statement and he was not reading.

[fol. 115] The Court: I want to say in the haste of a trial, I do not want to make a mistake. It is my impression the jury could get a misapprehension of what happened from the way it was happening, but Government counsel certainly must have been following and listening to what was said, and I want to know, and I am perfectly willing to direct the Reporter to write up that passage so I may have it in writing, so that if the Court said anything that was not justified, the Court will endeavor to correct it before the jury and make any necessary statement to set them right upon it. I know it is possible in the heat of a trial to sometimes misunderstand something or get a wrong idea of what has been said or done, and I am perfectly willing to direct the Reporter at this time to furnish us with a transcript of what was said in that interchange, and I will go over it, and if there is anything there that should be corrected the Court will make every effort to do it, to correct it in the minds of the jury; and I will appreciate the Assistant United States Attorney, that is you, Mr. Boecker, in being of help to the Court in this matter.

Mr. Boecker: I will be happy to do so and abide by Your Honor's ruling.

Mr. London: I would like to make a record.

The Court: The record will go for you.

Mr. London: It will be in addition.

The Court: I say, it will go for you, too; any additional?

Mr. London: In addition, the defendant Cannella moves for a mistrial and interprets the remarks of Mr. Shenker as applying to Cannella, and in addition defendant Cannella states any remarks made concerning defendant Costello or counsel for Costello will definitely reflect in the eyes of the jury against Cannella inasmuch as they have been indicted jointly and are standing trial jointly, and for

this reason defendant Cannella not only moves for a mistrial but also moves and requests the Court to grant him a severance.

The Court: The Court will not make any further ruling at this time awaiting the reception of the transcript from the Reporter which I presume he can furnish me by tomorrow morning.

(The trial was then resumed before the jury and the following occurred:)

[fol. 116] LOUISE VIESSMAN testified as follows:

Direct Examination, by Mr. Boecker.

I am a secretary. I was formerly Mrs. James Price and my last place of residence with Mr. Price was 5762 Kingsbury. I am not acquainted with the defendant, Joseph Cannella, and I have never seen him as a visitor at my house.

I am acquainted with Joseph Costello and have known him for a period of about five years. I am also acquainted with Mr. Costello's wife and have known her for about ten years. I was with James Price as his wife for about seven years and during that time my husband and I would visit socially with Mr. and Mrs. Costello. I saw them often and we would play cards and go out together. I saw a gun in the apartment on Kingsbury but I could not describe or say that it was similar to Government's Exhibit 5.

Cross-Examination, by Mr. Shenker.

I am now divorced from Mr. Price and have been divorced from him for about six months. I last saw Mr. Price this morning here in St. Louis. Prior to today I have seen him at intervals. He has been in St. Louis right along. He is not sick and he is perfectly able to appear in this courtroom.

I was married to Mr. Price about seven years but I did not know all of his friends. He has many friends and acquaintances. He was in the tavern business at 4425 Olive Street. He is still in that business at that same address and he still takes care of that tavern.

ROBERT RICHTERS testified as follows:

Direct Examination, by Mr. Boecker.

I am a detective, St. Louis Police Department, and have been with the force for five years.

Q. Mr. Boecker: During the course of your official duties did you have occasion along about February of last year to apprehend Joseph Costello, the man that is a defendant in [fol. 117] this case? A. I did, sir.

Mr. Shenker: I am going to object to the form of the question. * * * The question, if the Court please, is objectionable on the ground of the use of the word "apprehend." There is no testimony here that they were looking for Mr. Costello, that he was not available, and this is just an attempt to place Mr. Costello's character at issue instead of trying him on the matter with which he is charged here.

The Court: Very well. Your objection is sustained to the question in its present form.

I interviewed Joseph Costello on February 27, 1955. I first saw him on that occasion at Tower Grove and Magnolia. He was driving his automobile at the time I first saw him. His automobile was a 1956 Cadillac convertible. It was black. I was riding in a police cruiser directly behind Mr. Costello and Detective Edward Boni was with me. I was driving. It was approximately seven o'clock in the morning. We pulled Mr. Costello to the curb and Boni stepped from the police cruiser and walked to Mr. Costello's car and placed him under arrest.

Q. Mr. Boecker: And what was done then?
A. Joe Costello——

Mr. Shenker: Just a minute. At this time, if the Court please, defendant will object to any testimony to be offered by this officer on the ground that it is totally incompetent, irrelevant and immaterial to points at issue in this case, on the ground that it does not tend to prove or disprove any of the allegations, for the reason that this is a matter that relates to an arrest which has been adjudicated previously by the State Courts on the ground that the arrest was improper and in violation of the defendant's Constitutional——

The Court: I had to stop to give an order to my bailiff. I do not know that I got every word. It is hard for me to tell at this time what may be pertinent.

[fol. 118] Mr. Shenker: I might, if the Court please, in order to clarify our position, which I am sure the Court knows generally what it is, that we are objecting to any testimony that is offered by virtue, by anyone, by any of the officers or any of the outgrowth or any matter that is the result of that arrest, on the ground that it is totally incompetent and improper, and that it is illegal because of the fact, as the Court is familiar, that this was previously decided in the State Court by Judge McMullan, and that any testimony to be offered by this officer or by any officer in connection with that——

The Court: I do not know that this Court is familiar with everything that happened in Judge McMullan's Court.

Mr. Boecker: I will submit it would not be binding, but I will stipulate Mr. Shenker's objection may run to the entire questioning of these police officers in connection with this episode.

Mr. Shenker: I did not want to take up the time of the Court to keep on repeating.

The Court: Very well. If that is satisfactory it may run.

Mr. Shenker: That is right. I will object to it, and any way the Court rules on it I will not have to repeat it and waste a lot of time.

[fol. 119] The Court: Proceed.

Mr. Shenker: In other words, that this officer's testimony and any testimony following——

The Court: It will all be heard subject to your objection all testimony along this line.

Mr. Shenker: That is right, that it is not admissible, in addition to any other reason there may be, the reason and the fact that this matter was adjudicated in the State Court insofar as the rulings of the court are concerned.

The Court: That will run to all the testimony of this witness that has any connection along that line. Proceed.

Mr. Costello accompanied me to the rear of his car at which time I was questioning him and Detective Boni was searching the interior of Mr. Costello's car.

Q. Mr. Boecker: What occurred at the rear of the car when you were with him?

Mr. London: I object, Your Honor, on behalf of defendant Cannella. I object to any conversation this witness had with defendant Costello on the ground it is irrelevant, hearsay as to defendant Cannella.

Mr. Boecker: I think any statement by Costello on this occasion probably should be limited to Mr. Costello in this case.

The Court: Very well. Let it be understood that this testimony given by this witness should be—the jury will be instructed that it is to be regarded only in connection with the defendant Costello, and should not be considered in relation to the defendant Cannella.

I asked Mr. Costello to open the truck of his automobile so I could search it, which he did. He produced a key from his person. He took it from one of his pockets. I do not recall which one. The key was on a chain with several other keys but I do not remember how many. After searching the trunk I asked Mr. Costello to close the trunk, which he did. Detective Boni came back to where Costello and I were standing and I asked Boni if he had searched the interior of the car.

Mr. Shenker: I object to any conversation between this witness——

Q. Mr. Boecker: It was in the presence of Costello, was [fol. 120] it? A. Yes, sir.

The Court: In the presence of whom?

The Witness: Costello, myself and Detective Boni at the rear of the car at this time.

Boni said that he had searched the interior of the car with the exception of the glove compartment which was locked. Boni asked Costello for the keys to the glove compartment and Costello replied that he did not have the keys to the glove compartment as it was his wife's car and

that he figures the key for the glove compartment was at his home. We asked Mr. Costello to drive his car to police headquarters. My partner accompanied him and I drove directly behind their car in a police cruiser. At headquarters Mr. Costello was asked to drive his car into a stall at the Central District garage and to secure his automobile so we could take him into the booking desk, which he did. By securing the car I mean locking it. I checked the doors and windows of the car and it was secured. Mr. Costello's car keys were handed to me after the car was secured and I turned them over to a garage attendant after logging Mr. Costello's car into a book. The logging includes recording the license number of the car, whose property it is, what officers brought the car in and where the arrested subject lives. The last I saw of the keys was when I turned them over to the garage attendant, Mr. Davis. We then took Mr. Costello into the Central District into the booking desk. I did not engage in any further search of that automobile after that time.

Mr. Shenker: I ask that the witness's testimony be stricken, if the Court please, in line with the objection we previously made.

The Court: Overruled.

Cross-Examination, by Mr. Shenker.

We arrested Mr. Costello at Tower Grove and Blaine which is approximately eight blocks away from Mr. Costello's home. He could have arrived at his place of business by the route he was taking at the time of arrest. We told Mr. Costello to pull into the curb and he did.

On the chain that was holding the ignition key there was only one key. There were more than one key on the chain that held the key that opened the back of the car [fol. 121] but I do not know how many. I looked through the back of the car while Officer Boni looked through the front of the car and we then had Mr. Costello drive to the police station. We then turned the keys over to Mr. Davis, the attendant. I personally turned the keys over to Mr. Davis. There was more than one key but I cannot recall how many. I do not know if there were more than four. I never saw those keys again.

Mr. Costello's car was a 1956 black Cadillac convertible with a white canvas top. The date of the arrest was Monday, February 27, 1956. I did not try any of the keys on the chain on the glove compartment. No other officer tried them in my presence.

• • •

The Court: There are one or two motions pending at the present time, I believe. Your motion, Mr. Shenker?

Mr. Shenker: That is right.

The Court: You have two motions.

Mr. Shenker: Well, I have the motion if the Court please, which is to the effect that in view of the Court's statement to the jury that I asked for a mistrial.

The Court: That was already overruled and that will stand. Now there is one other motion, I think.

Mr. Boecker: Mr. London asked.

The Court: Mr. Shenker joined in some other motion, I can't remember the exact wording.

Mr. Shenker: Well, I explained to the Court, if you recall, the way I felt, that because of the Court's statement——

The Court: Yes, I know. Well, anyhow, the Reporter has written up the transcript and I have read it and gone over it, and the ruling I verbally made stands. Your motions are both—I think you have an additional motion for a mistrial.

Mr. Shenker: That is right.

The Court: They are both overruled; and your motion, Mr. London, you have a motion for a mistrial?

Mr. London: Motion for mistrial, motion for severance.

The Court: And that is overruled. Proceed.

[fol. 122] EDWARD L. BONI testified as follows:

Direct Examination, by Mr. Boecker.

I am a police officer and have been with the St. Louis Department for three and one-half years. I accompanied Officer Richters on February 27, 1956, in the questioning of Joseph Costello. We first saw Mr. Costello approximately a block north of Magnolia Avenue on Tower Grove. We stopped Mr. Costello and I examined his automobile.

Mr. Shenker: The record may show, if the Court please, that the objection which we have previously made to this line of questioning——

The Court: I think that was stated already.

Mr. Boecker: That is my understanding. It runs throughout.

The Court: That goes for both counsel.

Mr. Shenker: That is right, and that all of this testimony is the result, either the by-product or directly the result of the search and seizure that was made on that day in question on that arrest to which the officer is testifying.

Mr. Costello's automobile on that date was a 1956 black Cadillac convertible. I examined the interior of the car. The car has a glove compartment but I did not examine it as it was locked and I could not open it.

Q. Mr. Boecker: Did you talk to Mr. Costello about it?
A. I did.
Q. What in substance did you say to him?

Mr. London: May the record show we will object to this as to Mr. Cannella, any conversation being hearsay.

Mr. Boecker: As limited to Mr. Costello as to this.

The Court: Very well. The answer will be permitted, and the jury will be properly instructed at the time, told now that anything this witness develops along this line is to apply only in the case of Mr. Costello and is to be disregarded as far as Mr. Cannella is concerned.

I asked Mr. Costello if he had the key to the glove compartment and he said he did not as it was his wife's automobile.

At the police garage I saw Mr. Costello hand Detective [fol. 123] Richters a set of keys. I do not know if those keys were the keys for the ignition or to lock the car. At no time that I have testified to did I see the glove compartment open or see its contents.

Cross-Examination, by Mr. Shenker.

We saw Mr. Costello near Magnolia Avenue at approximately 7:05 a.m. That morning I had left my house at approximately six o'clock. I left my house to meet my partner. We were then going to work and we were going to check Mr. Costello's house on the way to work. We had passed his house when we saw him driving. When we passed his house we observed that his car was not parked there so we proceeded on and on making a left turn in Tower Grove Avenue we observed his automobile ahead of us. The place that we stopped him was in the general direction of his place of work.

I had none of the keys in my possession as I did not take any of them from Mr. Costello. I tried no keys in the glove compartment. Officer Richters did not try any of the keys in the glove compartment in my presence. I do not know how many keys Mr. Costello turned over to Mr. Richters. I have no idea of approximately how many keys there were. I was approximately fifteen or twenty feet away. There were, however, more than one key but I could not say that it was more than two or three or four or anything like that I never handled the keys and they were turned over at the police garage.

Mr. Costello drove his car from the place of arrest to the police garage and I was with him. At one time I observed the ignition and saw that there was one key in the ignition. That is the only key I saw at that time. I did not see the key to the trunk. The trunk was opened while I was searching the interior of the car and I did not see it opened. I do not know where the ignition key was in the car or whether it was used to open the trunk. After Mr. Costello's car was locked in the garage and we got his property from the trunk I did not return to search the car. To the best of my knowledge, the property obtained [fol. 124] from the trunk was returned to Mr. Costello. I believe it was returned to him the same day that he made

bond. I did not take any of Mr. Costello's keys with me as I did not have any of his keys. Officer Richters turned them over to the garage attendant.

Mr. Costello was not physically in my presence at all times until he was released on bond. I do not know whether he was physically in the police station at all times until he was released on bond. I was responsible for his arrest and he was my prisoner. He was taken to the showup which is in the police station proper but he was not in my presence.

Q. Mr. Shenker: Then he was in the police station from the time he was arrested some five or ten minutes after seven and he was brought in maybe fifteen or twenty minutes later, long enough to drive down, until he was released on bail about twelve o'clock?

A. That I could not state now. After we took him to the showup he was there for a while and then we questioned him later on after that * * * in the police station.

He was not taken to the car to the best of my knowledge. [fol. 125] I did not go with Officer Sullivan to the car later that morning. I do not know if Officer Sullivan went to the car. I did not send Officer Sullivan any place and he was not sent to any place in connection with the car while in my presence. I do not know exactly when Officer Sullivan went to the car. I observed Officer Sullivan at the time of the booking at the Central District desk. I have no idea what time that was. I did not see Officer Sullivan take any keys.

I saw Mr. Costello give some keys to Officer Richters in the garage.

I recall testifying in the State Court in the latter part of 1956.

Q. Mr. Shenker: I will ask you, sir, if at that time, in response to a question by the State's——

Mr. Boecker: I will object to this without any more being said because he is putting words in the witness's mouth. There is no such foundation for any such question —if you said—hearsay.

The Court: Objection sustained.

Mr. Shenker: We would like to make an offer of proof.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. Shenker: I would like to show, the question I would ask of this witness is whether he did not testify at the time he testified in the State Court, the following question was asked of him, to which he gave this answer: "You never saw Mr. Costello give any keys to Officer Richters, and you never saw anyone in connection with this matter give any keys to Officer Sullivan, is that correct? Answer, That is correct."

Mr. Boecker: Well, that is beyond the scope of the direct examination.

The Court: What is the ground for your asking that?

Mr. Shenker: We are asking this for the purpose of impeaching this witness, because he testified that he saw Costello give some keys to Officer Richters.

Mr. Boecker: Not in his direct testimony. That was not brought out in direct testimony. I do not think it is proper [fol. 126] impeachment to open a new subject of inquiry.

The Court: Objection sustained. Proceed.

(The trial was then resumed before the jury, and the following occurred:)

Q. Mr. Shenker: Did Mr. Costello pull over to the curb and stop as soon as you motioned him to stop? A. He did.

Mr. Shenker: One other question, Your Honor. In view of the Court's ruling—I will show it to Mr. Boecker, I just want to make my offer of proof. It is on the same line.

The Court: Very well.

Mr. Shenker: This is the question (showing it to the Court).

(There was a side bar conference between the Court and counsel, during which the following occurred:)

Mr. Shenker: Defendant seeks to ask this witness whether at the time he testified in the State Court in November, 1956, whether this question was asked of him, to

which he gave the answer: "Question: Did you see him hand any keys to Officer Richters? Answer: No, sir, I never."

Mr. London: Both offers are adopted by defendant Cannella.

The Court: Objection sustained.

(The trial was then resumed before the jury, and the following occurred:)

After I got to the police station with Mr. Costello I saw some agents of the FBI. I don't remember exactly when I saw them but it was after the booking.

Q. Mr. Shenker: Well, would you say they were there within a half-hour after you came into the station?

Mr. Boecker: I want to make a further objection. Apparently this is introducing an affirmative defense by way [fol. 127] of cross-examination, which is improper.

The Court: Objection sustained.

Cross-Examination, by Mr. London.

On February 27, 1956, I left my house at approximately six o'clock and proceeded to Kingshighway and Page Avenue where Officer Richters picked me up. Officer Richters is my regular riding partner and has been my regular riding partner for over a year. I have been a member of the St. Louis Police Force for a little over three and one-half years.

The last time I saw Officer Richters was approximately twenty-five minutes ago. We ate lunch together during the noon recess of court. We did not discuss the testimony that he gave prior to the noon recess. There was no discussion at all about his testimony.

I saw some keys handed by Mr. Costello to Officer Richters but I do not know how many except that it was more than one key. I know it was more than one key but I do not know whether it was more than three or four. I did not discuss the testimony of Officer Richters during the noon recess.

Redirect Examination, by Mr. Boecker.

The place at which we stopped Mr. Costello's Cadillac was in the City of St. Louis, Missouri.

Further Cross-Examination, by Mr. Shenker.

On the day that we arrested Mr. Costello I saw Officer Sullivan in Central District at approximately eight-thirty or a quarter to nine in the morning. I turned over to Officer Sullivan a number of keys that I found on Mr. Costello's person after searching him at the booking desk. I do not remember how many keys there were. I turned over the keys at between eight-thirty and a quarter to nine. On that morning we arrived at the police garage at approximately seven-thirty in the morning. It could have been seven-thirty or seven-twenty-five. The FBI agents arrived about an hour after we arrived at the police sta- [fol. 128] tion. It could have been fifteen minutes one way or the other. On the morning of Mr. Costello's arrest I was driving the police car and we passed Mr. Costello's house before we saw him on the street. We went to Mr. Costello's house to ascertain whether he had arrived in the city yet, and we were going to arrest him. On passing Mr. Costello's home and observing his car was not there, we continued on our way.

Further Cross-Examination, by Mr. London.

During the noon recess I ate lunch with Officer Boni. I did not have any conversation with him concerning my testimony of this morning. I did have some discussion with him concerning matters relating to this case.

Redirect Examination, by Mr. Boecker.

There were two sets of keys, one of which was given to the garage attendant and I later obtained others from Mr. Costello which I gave to Officer Sullivan.

Mr. Costello's house is located on Gurney Court in St. Louis. I know Mr. Costello lived there for the past year.

JAMES C. DAVIS testified as follows:

Direct Examination, by Mr. Boecker.

My name is James C. Davis. I am a utility man for the St. Louis Police Department garage. I was on duty when Officers Richters and Boni reported in with Joseph Costello in his automobile on about the 27th of February, 1956. When they came in the office they signed his name, I guess, in the book, and gave me the keys to the car. They gave me more than one key. The keys were on a regular key chain. I took the keys and locked them inside the office in a closet. I did not go to the car at any time. At about nine-thirty or so I gave the keys to Officer Sullivan of the St. Louis Police. I went to the car with him. I was familiar with the continental kit on the trunk and I showed him how to drop it down and unlock the [fol. 129] trunk. That is all. I then left. I did not see what else he might have done. He, later on the same day, returned the keys to me. He did not turn over any other keys to me.

Cross-Examination, by Mr. Shenker.

As a utility man, I am a garage attendant gassing up the cars, parking them and putting air in and servicing the cars and keeping the garage in order. I am not the only attendant in the garage but on the 27th of February I was the only attendant there. The garage occupies the entire first floor. It is about a half a block. On that particular morning there was no one else on duty that had to look after the garage.

I was handed some keys by Officer Richters and I put them in a little room and locked that room. When I am on duty I always keep the room locked.

Q. Mr. Shenker: You say when you are on duty you always did; but you do know generally that room was not kept locked, is that right?

Mr. Boecker: I object. It is improper, what was done specifically is what is at issue here.

The Court: Sustained.

Q. Mr. Shenker: Well, do you know whether it has been the practice in the police department not to lock that room?

Mr. Boecker: I object to what the practice was.

The Court: Sustained.

I do not remember exactly how many keys Officer Richters gave me but it was more than one. I am not sure if it was more than two or more than three or four. I did not discuss this question with Officers Richters or Officer Boni as to the testimony that there was more than one key.

Officer Richters logged the car in on the book. I do not know what name he wrote in the book. I put the license number of the car on a little piece of paper and put it on the keys and hung it on a nail. The car was removed from the garage later that day. I turned the keys over to another officer that came down. He signed out the car. He signed it out when Mr. Costello was ready to go. I do not [fol. 130] remember who that officer was. I had no dealings with the car from the time it was brought in by Officer Richters until it was signed out. I did at one time turn the keys over to Officer Sullivan and he later returned them to me, when he got through searching the car. He had the keys for about an hour or so. I do not know how many keys he returned to me and I paid no attention as to whether he returned more than I gave to him. To the best of my recollection, it was the same keys. I know it was more than one key. I check the cars in and check them out. There is no record kept of anything that is done in between those two points of time.

I later turned the keys over to another officer who came down with Mr. Costello. It was not Officer Sullivan but I do not know who it was.

There were approximately fifty cars in the garage at that time. Officer Sullivan was not one of the officers that came in with the car when Mr. Costello's car was brought in. When I turned the keys over to Officer Sullivan he just asked for them and I gave them to him. He had no written order or request.

[fol. 131] JEREMIAH SULLIVAN testified as follows:

Direct Examination, by Mr. Boecker.

My name is Jeremiah Sullivan. I am a Detective Sergeant in the St. Louis Police Department. On February 27, 1956 I was on duty and it was part of my duty to obtain some keys from Mr. Davis, one of the garage utility men. I obtained the keys at about nine a. m. in the morning. They were the keys to Mr. Costello's automobile that was in the police garage. There was more than one key that I received. Mr. Costello's automobile was a black Cadillac convertible. I used one key to open the trunk compartment of the automobile and I searched that and closed it and I used one key to open the door of the automobile. I didn't pay any attention as to whether I used the same key for the trunk and the door, or different keys. After getting into the interior of the car I used one of the keys obtained from Davis to open the glove compartment of the automobile. I found two guns in the glove compartment. Government's Exhibit 6 is a gun I found in the glove compartment. At the time I found Government's Exhibit 6 it was fully loaded. I later removed the ammunition from the gun. I have that ammunition with me now in this envelope. The cartridges were placed in the envelope in my presence. These five cartridges are the same five cartridges which I removed from the gun. This envelope in which the cartridges are contained is one of the regular evidence envelopes of the police department. It was turned over to our police laboratory and I later obtained it from the Laboratory.

(The item referred to was marked Government's Exhibit 7.)

Mr. Boecker: At this time, Your Honor, I would like to offer Government's Exhibit 7 in evidence on the identification of this witness as being bullets taken from this gun, Exhibit 6.

Mr. Shenker: Of course, all this officer's testimony and the offer is subject to the objection that we made before with reference to this all being an improper search, and all of which being the product of the improper search and so forth, not repeating the whole objection; but we want

[fol. 132] to further add an additional objection to this specific matter on the ground it is totally incompetent, irrelevant, immaterial insofar as this case is concerned.

Mr. London: I add to that.

The Court: Why so?

Mr. Shenker: There is no charge, no allegation here in this indictment, if the Court please, of transporting any bullets; the allegation here is specifically on the counts charging that certain guns were transported or conspiracy to transport, and there is not anything said there about any bullets, and certainly there is only one purpose that these were offered for, that is to becloud the issue and unduly and unjustifiably create bias and prejudice in the minds of the jurors.

Mr. Boecker: They are offered on the theory, Your Honor, that the gun was in possession of defendant Costello, and that the bullets must have been placed there by him or caused to be placed there by him, and indicates his interest in the gun and his interest and motive in transporting the gun prior thereto.

The Court: The objection is overruled.

Cross-Examination, by Mr. Shenker.

On the day in question, I arrived at work around eight-thirty or a quarter to nine. I first parked the police car in the garage and then went to the Central District booking room and spoke to Detective Richters. I then went to Room 404 or 405 of Police Headquarters and left my hat and coat and revolver and then went to the police garage. My conversation with Officer Richters in the booking room was about a quarter to nine. I went to the garage at about nine o'clock. Prior to going to the garage, Officer Richters gave me some keys. It was a group of keys, but I have no idea how many. I never used them. I put them in my pocket. I later returned those keys to Officer Richters and did not give them to Mr. Davis, the garage attendant. I returned the keys that the garage attendant gave me to the garage attendant.

When I opened the trunk of the car, James Davis, the [fol. 133] garage attendant was present, but I don't know

whether he remained at the car all of the time. When I opened the glove compartment I know I was the only one inside of the automobile. After searching and securing the car, I returned the keys to Mr. Davis. I did not sign anything when I got the keys from him or get a receipt when I returned them. Mr. Costello was not present while I was searching the car. I had seen Mr. Costello that morning when I talked to Officer Richters in the Central District. Mr. Costello was under arrest. As far as I know, Mr. Costello remained in the police station. I don't know if I used the same or different keys to open the car, the rear of the car, and the glove compartment.

The bullets in the gun were later turned over to the ballistics experts of the police department.

I had no conversation with Mr. Costello prior to searching the automobile. After the search I had conversation with Mr. Costello at our office in the police station.

I do not recall how many keys Officer Richters gave me. It was a group of keys. I can reall receiving five keys from the garage attendant, Mr. Davis. There could have been more than five.

Government's Exhibits 6 and 7, being the gun and bullets, were turned over to the laboratory of the St. Louis Police Department. They test-fired the gun. I did not see any report that they checked for fingerprints on the gun. The laboratory is to check for fingerprints.

M. D. YOUNGER testified as follows:

Direct Examination, by Mr. Boecker.

I am a salesman for Lindburg Cadillac Company and I am acquainted with Joseph Costello. I have had [fol. 134] business dealings with Mr. Costello in selling him automobiles. The last automobile I sold him was a 1957 model car. Prior to that I sold him a 1956 black convertible. The 1956 black convertible was delivered on December 30, 1955.

These cars are in the name of Mrs. Costello and are not in Mr. Joseph Costello's name. In making the sale I dealt with both Mr. and Mrs. Costello. I do not recall who took delivery of the black car.

We have a regular follow-up contact which we make on customers and I made such a contact with Mr. Costello after the car was sold. I do not recall asking him whether he had been driving the car or about the performance of it.

I believe Mr. Costello traded in another 1956 model on the 1956 black convertible since the automobile we sold him originally was not satisfactory and we replaced it with the black automobile. The automobile replaced by the black convertible was a 1956 blue convertible being a very light blue which might commonly be called powder blue. He did not have the blue car for more than two months. That would be the months of November and December of 1955. I have had other dealings with the Costello family, having sold other cars to Mrs. Costello. I sold them a 1956 Cadillac Eldorado. At no time did they have more than one Cadillac at a time to my knowledge. They always had another car which was not a Cadillac.

Q. Mr. Boecker: Over what period of time, to the best of your recollection, have you dealt with the Costello family, or one or the other of them in the sale of Cadillacs?

Mr. Shenker: I will object to that, if the Court please, I would like to know what the purpose of this testimony is.

Mr. Boecker: Well, it connects up with the use of the keys, Your Honor.

Mr. Shenker: Well, I want to object to that if it is for that purpose. If the Court please, again we will object to it, that this is an attempt by the Government that they set up a statement and then attempt to show it by evidence, that the statement which they offer into evidence is not the true statement, that is certainly improper.

[fol. 135] Mr. Boecker: Well, I am attempting to show that the evidence of Mr. Costello's statement is false, and as I outlined in my opening address, that is for the purpose of showing guilty knowledge, and there is ample authority which I am not prepared to produce that that is competent evidence in the case.

The Court: Objection overruled.

Mr. Shenker: Of course, this testimony, Your Honor, is also subject to the same objection, including the motion, evidence offered in the motion to suppress.

The Court: That may be. He may answer.

To the best of my knowledge I have been dealing with the Costellos about three and one-half to four years.

Q. Mr. Boecker: I am referring particularly to the black convertible. Can you tell us please what key or keys you furnish with the automobile? A. We furnish——

Mr. Shenker: I am going to object to that, if the Court please, not what key or keys they furnish, but the question as I can see it is totally irrelevant. The question would be, if it is at all competent, what key or keys this witness turned over to Mr. Costello, certainly not what key or keys they furnish generally.

* * *

The Court: He may answer.

A. We in many cases will furnish three complete sets of keys.

A set consists of an ignition key which fits both the ignition and the doors, and a trunk key that fits both the trunk and the glove compartment. At least one such set was furnished with the black '56 convertible, I believe.

Q. Mr. Boecker: Well, that would be the standard set of keys, is that right, on a '56 car of that character?

Mr. Shenker: I am going to object unless this witness knows what was furnished. I will ask that that answer be stricken unless he furnished them.

Mr. Boecker: Your Honor, it connects up because the officer already testified he used keys from Mr. Costello to operate both the trunk and doors.

The Court: Objection overruled.

[fol. 136] One key fits the ignition and all of the door locks and one key fits the glove compartment and the rear trunk. I would say that that same system of keys was common to the earlier 1956 model which I sold, the light blue one. The same system of keys has been used by Cadillac since I have been with the company, for four or five years. That

same system of keys would be used on any car purchased in the last four or five years, referring to Cadillac automobiles.

Cross-Examination, by Mr. Shenker.

The 1956 Eldorado Cadillac was a shade of pink and that was purchased by Mrs. Costello. There was the blue convertible, either before or after the pink Eldorado, and then the black convertible. Mrs. Costello did not have the blue convertible for more than about two months.

I have no independent recollection of turning any keys over to Mr. Costello independent of Mrs. Costello.

[fol. 137] Other keys not manufactured by the Cadillac Company would open the glove compartment on the Cadillacs. Every car to my knowledge that I have sold the Costellos has been in Mrs. Costello's name. The second car which the Costellos would own which was not a Cadillac was the car used by Mr. Costello. I know that the Costellos have had Oldsmobiles along with the Cadillacs. The Oldsmobiles are not titled in Mrs. Costello's name.

DAVID GENE CANNELLA testified as follows:

Direct Examination, by Mr. Boecker.

I live at 11200 St. John Avenue and I am the son of defendant Cannella. I was at home in 1955 but not in 1956. I am nineteen years old. I left home March 21, 1955. I returned for a visit in June of that year. I was not at home in the winter of 1955 to 1956 as I was overseas.

Q. Mr. Boecker: During the times that you were home, both before you left in March and when you returned for a visit, did you ever see any ammunition of this description? I am handing you a bullet taken from Government's Exhibit 7 here. Did you see that?

Mr. Shenker: Just a minute. I am going to object to that testimony. It is certainly vague, indefinite and uncertain, does not tend to prove or disprove anything, it is not of probative value, whether he has seen anything.

The Court: Objection overruled.

Q. Mr. Boecker: You may answer.

A. No, sir, I have never seen any of it. I would never see it if it was around the house. It would be hid.

Q. What was your answer?

The Court: What?

A. I say I have never seen any of it, no, sir, but it would be hid if it was there.

Q. Mr. Boecker: Didn't you tell the FBI agents if any [fol. 138] had been there you would have known about it, rather your commanding officer who took your statement?

Mr. Shenker: Just a minute. I am going to object to that on the ground that it is improper impeachment, improper questioning, improper statement and certainly submit the very fact the very statement in itself is prejudicial. How would he know whether he saw it or whether he would not see it, if somebody lives in the house? He would not know what is in the house.

The Court: Don't argue the case.

Mr. Shenker: What is in there?

The Court: You don't need to argue the case any further.

Mr. Shenker: Thank you, Your Honor.

* * * *

The Court: Do you want the record to stand that way?

Mr. Boecker: Your Honor, I again claim surprise of the witness, and expect to be able to show that he made the statement as suggested in my question and contrary to the answer he has volunteered here in court in answer to his direct question. I ask leave to cross-examine him.

The Court: Very well.

Mr. Shenker: I am going to object to that, if the Court please.

The Court: Overruled.

* * *

A. I says that to the best of my knowledge, when they asked me the question, that if it was there I would not, I would never see it. That is the way I told them.

Q. Well, in discussing it didn't you say first that you saw no—you knew that there were no shotgun shells around; do you recall that?

A. I knew there was shotgun shells around but they were hid, I did not know where.

Q. With regard to that, do you recall whether or not you said if such shells were around I am sure I would have known about it?

A. No, sir, I do not. The way I tried to answer the [fol. 139] question was if they would have been there I would never have known about them because they would be hid in the house to keep me and my brother from finding them.

My signature is at the bottom of this type page statement. I read it before I signed it. I also read the part that says I have initialed each page and written correction on page 5. It is part of what I signed too.

Q. And you made no correction here where it says if there had been any shells I would have known about it, did you; where it says, I would have known about it, you did not undertake to correct that, did you?

* * *

A. Well, no, sir, I did not. I just want to answer the question, I answered in the way just like I said, if there would have been some there that I would not have known about it. It could have been there and it would have been hid.

Q. But this says if there had been you would have known about it, doesn't it?

Mr. London: I am going to object to this being repetitious. The witness has already answered the question.

The Court: Overruled.

Q. Mr. Boecker: This says you would have known about it, doesn't it? A. Yes, sir.

Q. And isn't that what you told them when your commanding officer swore you to this and when the FBI agent [fol. 140] was there to take it? A. Yes, sir.

Q. Now, did you tell the truth on that occasion?

A. I told them to the best of my knowledge that I would not know about it.

The Court: You told them what?

The Witness: To the best of my knowledge I would have not known about the ammunition being there.

Q. Mr. Boecker: In other words, when you signed this it was not a true statement, that they did not write it down as you gave it, is that your answer?

A. They did not write it down the way I seen it, the way I meant it.

Q. You read it or had it read to you?

A. Yes, sir, I looked through it.

Q. But you paid enough attention to make a correction on page 5, didn't you?

A. They made the correction themselves, sir.

Mr. Shenker: We object to counsel arguing with the witness.

The Court: What?

Mr. Shenker: We object to counsel arguing with the witness.

Mr. Boecker: I submit, Your Honor, the subscription bears the statement that there is a correction on page 5, and I merely want to call his attention to that.

The Witness: They made the correction themselves, and they wanted me to sign where they made their own correction.

Q. Mr. Boecker: Do you mean to say that they changed your statement contrary to your wishes?

A. No, sir, they just wanted to know when they changed the statement there that I knew about it.

Q. Whose signature is this, signs with the initials indicating he is a lieutenant commander?

* * *

A. Commander—oh, I don't remember his name now. [fol. 141] He was a Naval officer present during this questioning and he signed the statement as a witness.

The Court: What was the rank of this officer?

The Witness: Lieutenant Commander, sir.

The Court: Lieutenant Commander.

Q. Mr. Boecker: And do you say that in his presence this statement was changed contrary to your wishes, and you were required to sign it in the presence of an officer of the United States Navy; is that what you are saying?

A. Do you mean the change that was made in there?

Q. I mean the change that was made and the change that you now want to make on the other part where you said you would not have known about it instead of saying you would have known about it; do you say those things are both contrary to your wishes and that was all done in the presence of an officer of the Navy?

A. It was but——

The Court: What?

The Witness: It was but I still say when I answered the question I answered it in the way that if it would have been, it could have been there and I would not have known about it because it was hid.

The Court: It what?

The Witness: Because it could have been there but I would not have known about it because it would have been hid.

The Court: Why do you say that?

The Witness: Because my father would not leave the ammunition laying around for me or my little brother to get around.

Q. Mr. Boecker: Can you offer any explanation as to why this statement that was taken in the presence of one of the officers and an FBI man has an incorrect statement in it in one place and in another place has a correction made which you say you did not authorize; have you any explanation for that?

A. Well, they wanted to make a change for some reason, I don't know what the reason was.

The Court: Wanted to make a change where?

[fol. 142] The Witness: On the statement there.

The Court: On what page? Let me see it.

Mr. Boecker: The reference was made to page 5.

The Witness: I don't see any correction on here. I don't see where it is at. I know they made one.

The Court: Point it out to him.

Q. Mr. Boecker: Is there a word stricken out here? This is page 5 we are looking at, isn't it? Does there appear to be a word stricken out here? A. Yes, sir.

Q. With the initials? A. D. G. C.

Q. Is that a correction?

The Court: And whose initials are those?

The Witness: Those are mine, sir.

The Court: You put them there, did you?

The Witness: Yes, sir.

• • •

Cross-Examination, by Mr. London.

I am now nineteen years old. On April 26, 1956, I was eighteen. When this statement was taken from me there were two Federal detectives present. When I gave them the statement I wanted them to understand that there could have been shells in the house but that I would not have known about it. That was the truth.

There are about five rooms in the house and a basement. While I was at home my father, mother, brother and myself were living in the house. My brother is now thirteen. In April of 1956 he was twelve, I believe.

There could have been shells in the house and I would not have known about it and that was my intention when I gave the statement and my thoughts in the matter have not changed at any time since I gave the statement.

• • •

Mr. Shenker: Before you announce the adjournment I want to make a motion to strike all of this witness's testi- [fol. 143] mony on the ground that it is totally incompetent and inadmissible as far as defendant Costello is concerned.

Mr. London: The same as to Cannella.

The Court: Overruled.

Mr. Boecker: I want to make sure Exhibit 7 includes the contents of the envelope, being the five bullets and not just the envelope.

The Court: Very well.

HERBERT K. MOSS testified as follows:

Direct Examination, by Mr. Boecker.

I am the Assistant Agent in charge of the FBI, St. Louis, Missouri, and have been with the FBI for about twenty-three years. I am a law graduate and a member of the Missouri Bar.

During the course of my official duties with the FBI I had occasion to interview defendant Cannella on April 10, 1956 in Room 419 of the Federal Building, St. Louis. Mr. Cannella had been brought to my office by Special Agents Porter and Bush for the purpose of an interview.

Q. Mr. Boecker: Was his appearance voluntary on his part? A. It was.

Mr. London: I object to that, Your Honor. It calls for a conclusion on the part of this witness.

The Court: Sustained.

Mr. Cannella arrived at the office at about nine-thirty a. m. on April 10, 1956.

Q. Mr. Boecker: At some time during the interview did you ask Mr. Cannella if he would be willing to sign a written statement regarding matters that were there being discussed?

Mr. London: If the Court please, I object to this on the ground it would be hearsay and also on the grounds it would be a violation of a no-comment rule and violate the defendant's Constitutional rights.

The Court: Wait a minute. He is asking—you are representing Mr. Cannella?

Mr. London: That is right.

[fol. 144] The Court: And he is asking what he said to Mr. Cannella.

Mr. Boecker: That is correct, Your Honor.

Mr. London: Let me have the question repeated. My objection may be premature.

The Court: Read the question.

(Question read.)

The Court: How would that be hearsay as far as Cannella is concerned?

Mr. London: It is a violation of the no-comment rule. Defendant is not required to make any statement, and I will also add to that it would be hearsay because it was something that was said by a party outside the jurisdiction of this court, not under oaths, regardless of the fact the party is here now.

Mr. Boecker: It is offered as an admission and the jury may be instructed if such evidence is received it can certainly be received only as to defendant Cannella.

Mr. London: What this gentleman said could not be an admission on the part of any defendant.

Mr. Boecker: Whether he signed a statement?

The Court: What he said?

Mr. London: I did not hear you.

Mr. Boecker: The fact he asked defendant whether he was willing to sign a statement and his answer to that?

The Court: It is difficult for me to understand what point you are trying to make to a question he asked your client, Mr. Cannella.

Mr. London: That is right.

The Court: How could that be?

Mr. Boecker: I will submit, Your Honor, that if the answer Cannella gave were in the negative it would be improper, but I anticipate an affirmative answer.

Mr. London: I object to that, Your Honor. Mr. Boecker is not testifying in this case and any statement he had to make like that should be made out of the hearing of the jury, and on that ground I move for a mistrial.

• • •

[fol. 145] The Court: Objection overruled.

Mr. Shenker: If the Court please, now we are in a different position on this question.

The Court: I will concede that your position is different.

Mr. Shenker: Yes, Your Honor; and we would at this time respectfully object to any question or any conversation that this agent and this witness had with Mr. Cannella for the grounds that this is purely hearsay as far as the defendant Costello is concerned, not binding on the defendant Costello, and that the admission of testimony of this nature in this case could only serve to unduly and unjustifiably bias and prejudice the minds of the jurors against the defendant Costello, and this would be predicated on a statement where he was not present, had no opportunity to participate in it, to either affirm it or deny it, and that we are asking—we are objecting to its introduction and also asking at this time, if the Court please, that a mistrial be declared as far as Mr. Costello is concerned, and that a severance be granted to him in view of this testimony that is sought to be offered.

Mr. Boecker: Well, I concede, Your Honor, that the statement cannot be binding upon Mr. Costello.

The Court: No question about that, and the Court can instruct the jury to that effect.

Mr. Boecker: We will join in a request for such instruction.

The Court: That is sufficient because, of course, any statement made by defendant Cannella would not be binding on the defendant Costello. The question that involves itself in my mind, whether or not at this stage—I think this first question can be answered, as to what answer Cannella made to that request, if he asked such question. You may answer that question. Don't go any further. Do you have the question in mind, Mr. Moss?

The Witness: Yes. Actually I did not ask Mr. Cannella to sign the statement which we prepared in view of his physical condition.

Mr. London: At this time, Your Honor, I will ask that that be stricken, that the jury be instructed to disregard it

and a mistrial be declared. It puts defendant's character in issue before defendant has chosen to do so. There is [fol. 146] reference to a physical condition, and there is no explanation what that physical condition has been, and it would prejudice the defendant in the eyes of the jury, and I ask that a mistrial be declared on that ground.

The Court: Overruled.

During the course of my interview with Mr. Cannella, I dictated to a stenographer in the office. This dictation was undertaken in Mr. Cannella's presence. The dictation was of matters which had been related to me by him.

Q. Mr. Boecker: And during the course of the dictation, did you pause from time to time and during those pauses did Mr. Cannella on occasion make amendments, changes or additions to the matters you were dictating?

Mr. London: I object to the form of this question. This is a Government witness. He is leading him, putting the words in his mouth, answers to the questions which he supposedly is asking.

The Court: Overruled.

A. He did.

Q. Mr. Boecker: And was anything stated to Mr. Cannel'a concerning the purpose of this dictation?

Mr. London: I object to that as calling for hearsay.

The Court: Overruled. You may answer.

A. Yes.

Q. Mr. Boecker: What did you say to him, or what was said as to the purpose?

Mr. London: I object to that, Your Honor, as calling for hearsay.

The Court: Overruled.

A. I advised him that the FBI were conducting an investigation into the purchase of guns at Granite City, Illinois, the transportation of one of them to St. Louis, Missouri, which gun was found in an automobile driven by a defendant, Mr. Joseph Costello.

Q. Mr. Boecker: Regarding your purpose in dictating to [fol. 147] a stenographer, did you mention to him any significance of purpose in mind that you had in dictating?

Mr. London: I object to that, Your Honor, calling for a conclusion and calling for hearsay.

The Court: Overruled.

A. I indicated to him that we were going to record in written form an oral statement he had made to us.

Q. Mr. Boecker: And at the conclusion of the dictation did the secretary then transcribe what had been dictated?

A. She did.

Mr. London: I object to that, Your Honor, as calling for a conclusion.

The Court: Overruled.

* * *

I have in my possession the transcription which I read and I read it through on the day that it was made.

Q. And did you note at the time that it correctly recorded what had been dictated by you and with Mr. Cannella joining in?

Mr. London: I object to that as calling for a conclusion, Your Honor. He was not the party that prepared it.

A. I did.

The document is the same now as it was then without any changes having been made in the interim.

(The document referred to was marked Government's Exhibits 8-A, 8-B, 8-C, 8-D and 8-E.)

* * *

[fol. 148] Exhibits 8-A through 8-E does not have any other subject matter than Mr. Cannella's statements as dictated except an indication that it was witnessed by myself and another agent.

Q. Mr. Boecker: Let me ask you in this way: is the subject matter of Mr. Cannella's statements which you recorded in that dictation concerned with the sale and transportation of the guns you have earlier referred to?

Mr. London: I object to that as calling for a conclusion on the part of this witness.

• • •

The Court: Objection overruled.

The Witness: The answer is yes.

Mr. Boecker: Your Honor, at this time I would like to [fol. 148] offer into evidence the exhibit consisting of five pages marked 8-A through 8-E, as a note made contemporaneous with the event.

Mr. London: At this time, Your Honor, we will object to Exhibits 8-A, 8-B, 8-C, 8-D and 8-E, all inclusive, on the ground that it is hearsay; on the grounds there has been no showing that this statement was in any way voluntary; on the grounds that this is a statement taken of a man who is a prospective defendant at a time when it was known he was a prospective defendant and he was not afforded the right of counsel; further on the grounds that the statement contains evidence which the Government is attempting to introduce which is completely contradictory to the Government's evidence in their case in chief, and if the Government is offering the statement the only theory upon which they can offer it is to attest to its truthfulness and by introducing testimony which is contrary to their prior testimony it would have no probative value in this court.

The Court: Overruled.

Mr. Shenker: At this time, if the Court please, defendant Costello rises, if the Court please, to object to the introduction of this statement for the reasons which we have previously given, which the Court said that those were only preliminary questions and, therefore, could have been answered. Now, they are seeking to introduce the statement proper, and we are incorporating all of the reasons which we have given, and I presume that the record may show that Mr. Costello was not present, Mr. Moss, isn't that right, when this statement was taken?

The Witness: Mr. Costello was not present.

The statement was never exhibited to him by me or anyone in connection with me.

Mr. Shenker: So, therefore, if the Court please, the reasons which we have heretofore given, we are objecting to it, and we are further requesting that a mistrial be declared and that the defendant Costello be given a severance and tried separately in this case.

The Court: Overruled.

Q. Mr. Boecker: Will you read the statement, Mr. Moss?
[fol. 150] A. April 10, 1956. St. Louis, Missouri.

Mr. Boecker: May I interrupt. It is understood, Your Honor, this offer is limited to defendant Cannella.

The Court: What?

Mr. Boecker: The offer of this statement is limited in its application to defendant Cannella.

The Court: Yes.

* * *

Mr. Shenker: May the record further show, I don't want to belabor the point, as we indicated to the Court in the opening statement, that all the reasons which we have given, after Mr. Boecker made the opening statement, in support of our motion for a severance, that they be incorporated together with this objection; Your Honor, that was all matters which were gone into in detail as we dictated them. * * * So they may all be incorporated in this objection.

The Court: Yes.

* * *

Mr. London: As to defendant Cannella, we would like to add to our objection, no proper foundation has been laid for the introduction.

The Court: Very well. Proceed.

Q. Mr. Boecker: Read it.

A. I, JOSEPH JOHN CANNELLA, make the following voluntary signed statement to Special Agents Herbert K. Moss and Earl C. Porter, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I have been advised that I do not have to give a statement and that any statement I do make may be used against me in a court of law. No threat——

Q. May I interrupt. Did you tell those things to Mr. Vannella on that occasion?

A. I did, at the inception of the interview.

No threats or promises of reward have been made to me in order to get me to give this signed statement. I have been advised of my right to consult with an at-[fol. 151] torney prior to furnishing a statement. I was born April 12, 1915, at St. Louis, Missouri. I presently reside at 4713 Hatz, Northwoods, Missouri. I have been employed as an Ace cab owner and supervisor for Ace Cab Company since about November, 1953. About the first part of December, 1955, Joseph Costello said to me at the Ace lot "Let's take a ride to Granite City, Illinois", and Costello and myself then drove in Costello's Cadillac automobile to Granite City, Illinois. Upon arrival in the vicinity of Granite City, Costello said, "We have to look around for a gun shop". However, Costello and I drove directly to Earl Lewis Gun Shop in Granite City, Illinois, in Costello's blue Cadillac convertible. This is the only stop we made. Upon arrival at the Earl Lewis Gun Shop in Granite City, Illinois, there was only one man present whom I know to be Earl Lewis, and he provided a catalogue of guns and Costello looked in the catalogue and picked out three guns from the catalogue and Costello told Lewis to order three guns for Costello, and to call me when they arrived. I told him to call "Joe, the supervisor", and to aid him in doing so I wrote the notation "Joe, Main 1-8495". Costello and I then returned to St. Louis, Missouri, and approximately a week later I received a radio call from the Ace Cab dispatcher requesting I call the Ace Cab office. I did call the Ace Cab office and a girl in the office told me to call a certain number. I did call this number and it was Earl Lewis. He advised me the guns that Costello had ordered had arrived. I then had the Ace Cab office tell Joe Costello that the guns had arrived at Lewis Gun Shop at which time Costello gave me $180 in cash, and I proceeded to the Earl Lewis Gun Shop, Granite City, Illinois, and upon arrival was advised by Lewis that the guns were not the exact type as ordered by Costello. From the Earl Lewis Gun Shop I then called Costello and he told me if the guns were not as he had ordered for me not to accept them.

I did not accept these guns, and returned to St. Louis. Upon arrival at the Ace Cab lot I offered the $180 to Costello which $180 he had originally provided to me to buy the three guns, at which time Costello directed me to put the $180 in an envelope and give to Joe Muth, and have Muth put the envelope containing the money in the [fol. 152] office safe at the Ace Cab office, which I did. About one week thereafter I again received a radio call from the r. dio dispatcher of the Ace Cab Company advising me to call the Ace Cab office, which I did. Some girl in the office advised me to call a certain number, which I did, which was the Earl Lewis Gun Shop, Granite City, Illinois. Lewis told me the guns that Costello had originally ordered had arrived. I then told Joe Muth that I wanted the envelope out of the office safe, which he gave me, and on the same date I made the telephone call to Lewis I proceeded to the Earl Lewis Gun Shop in Granite City, Illinois. Upon arrival at the Lewis Gun Shop, Lewis gave me the three guns which Costello had originally ordered, and I gave Lewis $180 as a purchase price for these three guns, and Lewis gave me some change, exact amount not recalled by me. However, it was only a few dollars, as I recall that the purchase price for each gun was approximately $59. This was the sum of $180 that Joe Costello had originally given to me as a purchase price for these guns as referred to above. Before departing from Lewis Gun Shop I signed the name "Joe Overbeck, 4186 Kingshighway,", city and state not shown, as a purchaser for these three guns. I then returned to the Ace Cab lot, St. Louis, Missouri, with the three guns in the cartons, took them in and placed them on a desk in Joe Costello's private office. In my presence Costello opened the cartons and looked at the guns. I have not seen these guns since delivering them to Costello in his private office. Sometime later, on the day or the day after Costello was arrested by the St. Louis Police Department in early 1956 and charged with——

Mr. Boecker: Just a minute, Mr. Moss. I believe that paragraph should be omitted as not containing any admission of Cannella's and therefore we skip that paragraph which started with the words "sometimes later", and I will ask that it be stricken and the jury may be instructed

to disregard it, if the Court please. Skip to the next paragraph.

Mr. London: Let's take a look, Mr. Boecker, what paragraph that is.

Mr. Boecker: Mr. Moss, will you start reading at the line which says "Special Agent Porter".

The Witness: Special Agent Porter has exhibited to me a [fol. 153] longhand entry dated December 22, 1955, in the name "Joe Overbeck, 4186 Kingshighway". I wish to state that this is my handwriting. Also Mr. Porter has exhibited to me a note "Joe, Main 1-8495", which I state is likewise in my handwriting. I provided this note with the name "Joe" to Earl Lewis on my first visit to Lewis Gun Shop. The entry "Joe Overbeck, 4186 Kingshighway" was made by me when I received the three above-mentioned guns from Lewis.

* * *

Mr. London: * * * That is the end of the statement?

The Witness: Yes, except for the witnesses.

Mr. London: We would like to renew our previous objection at this time, and ask that it be stricken, and as further grounds add that the statement in itself adds elements of hearsay which could not be binding against this defendant, and ask that a mistrial be declared.

* * *

The Court: Overruled.

Mr. London: To clarify it, when I ask that it be stricken I am referring to the statement.

The Court: Yes. Overruled.

Mr. Shenker: Have you finished your statement? I move at this time, if it please the Court, for the reasons heretofore given, I ask that this statement be stricken as far as defendant Costello is concerned and the jury be instructed to disregard it, and that a mistrial be declared insofar as defendant Costello is concerned, and that defendant Costello be granted a severance.

The Court: Overruled.

Q. Mr. Boecker: Mr. Moss, during the course of this interview had the defendant, Joseph Cannella, made any other statement or statements to you prior to this dictation? A. He did.

Q. And what statements did he make to you prior that are not reflected in the dictation.

Mr. London: At this time I would like to object, that would also be hearsay, and to save time we will just incorporate all of the grounds which I have heretofore entered into the record in our prior objections.

[fol. 154] The Court: Very well.

Mr. Shenker: May the defendant—the reason we make separate objections on this point, whereas before any objection made by one goes to the other, Your Honor can realize that this is a different situation, the same thing that applies to Mr. Costello may not apply to Mr. Cannella. May we object to anything further pertaining to this on the same grounds?

The Court: Overruled.

Mr. London: May the record show, if the Court please, so I do not have to continually get up——

The Court: It goes right through.

Mr. London: Unless there is some special point?

The Court: All this will be subject to your objections.

* * *

The Witness: He made a different statement relative to his purchase of these guns.

Q. Mr. Boecker: And how was that in point of time relative to this?

A. That statement preceded this statement that I have just read.

The first statement was not recorded, and the second statement was.

Q. What did he say in the first statement?

Mr. London: Same objection to this, Your Honor. I will also add to that, the Government is offering evidence in the Government's case in chief and, therefore, attesting to the credibility of that witness; and now is attempting

to introduce in evidence and place before the jury testimony and evidence which the Government expects to show is not true and, therefore, not in good faith in attesting to the credibility of their evidence.

Mr. Boecker: I propose to show an earlier falsified statement as evidence of guilty knowledge as outlined in my opening address, and I have authority permitting such evidence as competent on intent.

[fol. 155] Mr. London: This will also, Your Honor, put defendant's character in issue, and we are adding that to our objection.

The Court: Overruled. Proceed.

* * *

A. I shall have to refer to some investigative notes taken simultaneously with the first interview.

The Court: You may do so.

A. Defendant——

Mr. Shenker: Just in order that the record may be clear, you are again, Mr. Moss going to refer to matters which—an interview with Mr. Cannella in the absence of and not in the presence of Mr. Costello, is that correct?

The Witness: That is correct.

Mr. Shenker: And about which matters you did not confront Mr. Costello or interview him about.

The Witness: That is correct.

Mr. Shenker: * * * We will renew our objection on the same grounds we had made to the previous questions.

The Court: Very well.

Mr. Shenker: Thank you. The objection and request we made previously.

The Witness: Cannella, Mr. Cannella first related that in December, 1955, he himself, driving an Ace cab, made a trip from St. Louis, Missouri, to Granite City, Illinois, to the Earl Lewis Gun Shop for the purpose of buying, he said, two guns. He said that his neighborhood had been victimized by prowlers and he wished to buy two guns. He had when he made this trip from St. Louis to

Granite City, Illinois, in his possession $180 which he said that he had saved over a rather lengthy period of time for the purpose of buying these two guns. He said that he knew about the Earl Lewis Gun Shop through conversation from fellow cab drivers. So on the day, he said he did not remember the exact day but in December, 1955, he proceeded to the Earl Lewis Gun Shop, Granite City, Illinois, and ordered two guns and left a notation with the Lewis Gun Shop, Joe Main 1-8495, and left instructions that when the guns came in a telephone call was to be [fol. 156] placed to that number and Joe, the supervisor, was to be asked for. He said some few days thereafter he did receive a telephone call from the Lewis Gun Shop through the Ace Cab radio equipment, and he then made a trip over to Granite City, Illinois, again to the Earl Lewis Gun Shop, and at that time he paid for two guns, giving $180 in cash. However, at that particular point of the interview defendant Cannella stated on further reflection it was probably three rather than two guns because the amount involved would indicate three rather than two. He said on both of these trips to the Lewis Gun Shop he was alone. When he returned from the Lewis Gun Shop with the three guns in the original cartons as given to him by the gun shop proprietor he took the three guns out of his Ace cab and placed them in a safe in the Ace Cab office which safe was usually unlocked during the day. He left these three guns in their original cartons for an interval of time, he does not know exactly how long, until one day when he—which day he fixed as a day on which he borrowed a black Cadillac automobile from his boss, Mr. Joseph Costello. He borrowed this black Cadillac at the Ace lot and parked his own Ace Cab at the lot. He transferred the three, he placed the three guns in the original cartons into the dash of Mr. Costello's automobile with a view to taking the three to his, Cannella's, home when he drove this borrowed Cadillac to his home. He said he borrowed this Cadillac on this occasion because he was to attend a wedding ceremony, a ceremony in which a niece, one Margaret Cannella and a man, last name Albert, were to be married here at St. Louis and he wanted to borrow and be able to drive a Cadillac on the occasion of that wedding ceremony and reception out at the Kingsway Hotel.

Q. Mr. Boecker: Mr. Moss, let me interrupt you. What did he say was the date when he borrowed the Cadillac which he said was to attend the wedding?

A. He said that he did not know the exact, he said that it was, the date was the date that his niece and Albert were being married. He did not know the date independently.

Q. I see. Proceed.

A. So he borrowed the Cadillac, placed the three guns in the original cartons in the dash compartment, proceeded [fol. 157] to his residence, picked up his wife and a younger son, drove to the Kingsway Hotel on the same evening, where he attended this reception. Later that night he phoned the Ace Cab lot and ordered a cab to be sent out to Mr. Costello's residence in St. Louis, and he, Cannella, then drove this borrowed Cadillac to the reception, then to Mr. Costello's residence, where Cannella left this borrowed Cadillac, placed the keys over the sun visor and got into the Ace cab that he had ordered, returned to the Ace lot where he once again took over his own cab and went back to the reception at the Kingsway to meet his wife and his son. However, he says that although he intended to take the three guns home with him and intended to do so, putting them in the dash of the Cadillac, he forgot that these guns were in that dash compartment when he returned the borrowed Cadillac to Mr. Costello. I said—on the next day he had, at the Ace lot he had a conversation with Mr. Costello at which time Mr. Costello commented that, words to the effect that the guns you left in the glove compartment got me into trouble. The police found them in the car.

Q. Well, in other words, the day of the wedding as he told it would have been the day before Mr. Costello's arrest? A. That is correct.

Q. Now, did you make any comment—that is all of this, that you related just now is the first story that he told you? A. That is correct.

At the conclusion of his narrative of this first story, I commented to Mr. Cannella that I had just made, caused a check to be made of the marriage records.

* * *

Q. What else, if anything, did you tell him?

Mr. London: I will object to any statement of this witness, what the marriage records reflected, hearsay.

Mr. Boecker: All I am asking him, what he told Cannella.

Mr. London: As long as he does not go into what the marriage records reflected, I have no objection, but in the [fol. 158] event that is what he intends to say I want the record to show my objection.

The Court: What he said to Cannella?

Mr. London: This witness just testified he had the marriage records checked.

The Court: Yes.

Mr. London: If he is going to relate what the marriage records showed, I object to that being hearsay on the part of this witness.

Mr. Boecker: The question is limited to Mr. Moss stating in evidence what he said to Cannella.
I said something further to Cannella.

Mr. Boecker: Is that objection overruled, Your Honor?

The Court: Yes.

Q. Mr. Boecker: What else did you say?
A. Yes. I told defendant Cannella that the marriage that he referred to between Margaret Cannella and the individual whose name he mentioned did not occur in February, 1956.

Mr. London: Just a moment. I am going to renew my objection to this, Your Honor, and ask that it be stricken. The only way he could have gotten such information would have been by hearsay.

The Court: He is testifying what he told your client, Cannella.

Mr. London: But he is stating a fact which could only be obtained by him through some other party.

Mr. Boecker: We are not concerned with that related fact, only what he told Mr. Cannella.

Mr. London: It is still going into evidence.

The Court: The objection is overruled.

I told him the date of the marriage was October 15, 1955, and he said, "Well, I have told you an incorrect story." He then said he desired to tell the true account. That is when he gave the contents of the statement I read previously which is the statement labeled Exhibit 8.

Mr. Shenker: In order that we may preserve the record, Your Honor, this was the end of another phase that is a [fol. 159] different statement. We ask again that this be stricken and the jury be instructed to disregard it and that a mistrial be declared as far as defendant Costello is concerned.

The Court: The jury will be instructed that the jury shall disregard this as far as the defendant Costello is concerned, and it will only be considered as against the defendant Cannella.

Mr. Shenker: And the motion for a mistrial I presume is overruled.

The Court: Oh, yes.

On April 10, 1956, Mr. Cannella was in the office from approximately nine-thirty a. m. until about one p. m. During that period of time he had nothing to eat or drink in our office. There were no threats or promises made to him and no reward was given or promised and there was no punishment inflicted.

Q. Mr. Boecker: During the entire course of the interview did his demeanor and state of being appear to be normal?

Mr. London: I object to that, Your Honor, as calling for a conclusion.

Q. Mr. Boecker: I will ask you what his demeanor and state of being appeared to be to you.

Mr. London: Same objection.

Q. Mr. Boecker: Did you observe anything unusual about him? I will add that to the question.

Mr. London: Same objection to that, Your Honor.

The Court: Overruled.

A. I observed nothing unusual about him.

Q. Mr. Boecker: Would you say he was a man in normal health and mental condition?

Mr. London: Same objection, Your Honor, unless he is going to qualify this witness as a medical practitioner.

The Court: Overruled.

A. I noticed no unusual symptoms during the period of time you asked about.

Q. Mr. Boecker: Now, at the conclusion of the dictation did Mr. Cannella make any further statements beyond those recorded in the dictation?

Mr. London: I object to that as being hearsay, totally [fol. 160] irrelevant, incompetent, unless it is first qualified what these statements relate to.

The Court: Overruled.

A. Yes, he did make further statement.

Q. Mr. Boecker: And what did they relate to?

A. A fear that he had.

Q. And what was his statement?

Mr. London: I object to this, adding to the previous objection which I intend to incorporate at this time, the fact that this witness has been put on the stand to bring to the Court a written statement and also now is giving to the Court oral statements made in addition thereto.

The Court: Objection overruled. Proceed.

Q. Mr. Boecker: What did he say?

A. He said that he was very fearful over the fact that it would come to Mr. Costello's attention that he, Cannella, had provided this information to us.

Q. And did you observe him further at that point?

A. Yes.

Q. What, if anything, else did he say or do?

A. Well, he used the expression that he did not think his life would be worth a nickel.

Q. Did he perform any physical acts at about that time?

A. He began rubbing his hand over his forehead and rather continuously over a number of minutes, "My God, my God, what is going to happen to me."

Mr. London: I am certainly going to object to this, Your Honor. It has no probative value to this case and is being offered only to prejudice the minds of the jury. I am going to ask that a mistrial be declared on that account.

The Court: Overruled.

Q. Mr. Boecker: Did he perform any other——

The Court: Wait a minute. I think Mr. Shenker has something to say.

Mr. Shenker: I might have something to say about that, Your Honor.

[fol. 161] The Court: Yes.

Mr. Shenker: Defendant Costello, if the Court please, will now renew his request that a mistrial be declared on the ground that this is certainly improper; and while the Court, I presume, will continue to admonish the jury that that cannot be considered as evidence against Mr. Costello——

The Court: You are correct in that. The Court will do that.

Mr. Shenker: I submit, Your Honor, that that is not enough, and I do not think that it is possible to sit and to hear evidence of this kind without us having the right to cross-examine or the right to be confronted with the witness that allegedly made those statements; and I submit, if the Court please, we are certainly entitled to a mistrial and a severance and have Mr. Costello tried alone.

The Court: The motions are both overruled; proceed.

After some further minutes, Mr. Cannella indicated he was ill at his stomach. He asked to have the opportunity of placing his head on a wash basin. He complained of pains in his head and abdominal pains and he attempted to vomit. I asked if he was under the care of a physician and he stated he was not. That was the conclusion of the interview. We then assisted him in going to some other place that he indicated he wanted to go.

Mr. Cannella was in our office for the purpose of an interview and was there of his own free will. At about eleven-thirty or twelve noon however, he asked for permission to go to the wash basin.

Government's Exhibits 8-A, B, C, D and E were dictated to a stenographer named Mrs. Marie Lee Jennings who was an employee of the Federal Bureau of Investigation and who is now a housewife. Government's Exhibit 8 was the statement of the defendant, Joseph Cannella.

[fol. 162] The statement is what he told me.

Mr. Cannella did not start his statement by saying, "I, Joseph John Cannella, make a complete and voluntary signed statement to Special Agents", et cetera. I dictated that paragraph in his presence. That paragraph is, however, included in Government's Exhibit 8 which is the Exhibit that I said was a statement of Mr. Cannella. The first paragraph is not the statement of Mr. Cannella. It was dictated by me in his presence and he made no exception to it. It is a fact that the greatest part of this statement was dictated by me, and not by the defendant, Cannella.

After receiving the statement I don't think we confronted him with the fact that I disbelieved some of it. I don't think I have ever personally talked to Mr. Earl Lewis. I did hear his testimony in this courtroom. I have casually talked with Mr. Klaich. I did not formally interview him, I believe. The statements from Mr. Lewis and Mr. Klaich were in the office of the FBI and I would have access to it. I knew those statements were there. With respect to Lewis' statement, I offhand know of nothing to have confronted Cannella with after Cannella gave us the statement contained in Government's Exhibit 8. We did not know anything about Klaich.

After Mr. Cannella's first statement when we told him the date of the wedding that he referred to was incorrect, he reflected on it for several minutes and then stated that he wanted to make a correct statement. I indicated to him that we wanted a true statement and that obviously the first one was not true because the dates did not correspond, referring to the date of the wedding. That is

the only type of persuasion which I used. Upon his learning that the date which he had given for the wedding was incorrect and after reflecting for several minutes he voluntarily gave the second statement. Nothing else was said to him by me or other agents in the room.

I am a law school graduate and during my twenty-three years with the FBI I have prepared many statements. It is standard procedure for the agents to dictate the [fol. 163] statement from the notes we make during the interview and not merely copy down what the witness says.

Before calling in the stenographer, we went over the second story completely. The stenographer was not in the room when we first got our information which is contained in Government's Exhibit 8. The only people in the room at that time were Mr. Cannella, Agent Porter and myself. That was in our office suite, Room 419. The door to the room was very likely closed. The room is approximately fifteen by twelve, furnished with a desk, table and several chairs. Mr. Cannella was seated during the entire interview. Agent Porter and I were seated. I have no independent recollection of the temperature that day. I think Mr. Cannella was wearing a suit jacket, however, I am not certain. I am not certain if Agent Porter and I were wearing any suit coats.

The Court: How long ago was that?

The Witness: That was a year ago yesterday.

I am competent to carry side arms and I ordinarily do when I am away from the office. I am sure that applies to Agent Porter also.

Mr. Cannella came into our office at approximately nine-thirty in the morning. He was brought in by special agents Porter and Bush. He was brought from his residence. He was brought directly to our office. He left our office at approximately one o'clock. During that time he had nothing to eat. He was offered a cup of coffee and I think he took part of it. I don't remember whether Agent Porter had any coffee. I think that I did.

It is my recollection that when Mr. Cannella was in the office we knew nothing about Mr. Klaich. I do not recall from whom we found out about Klaich. I don't believe

we knew anything about Mr. James Price at that time. I can't recall. It is my impression that we found out that he received one of the guns subsequent to the interview.

Q. Mr. London: Do you have any recording in your FBI offices? A. I think——

* * *

[fol. 164] Mr. Boecker: I object to that as entirely immaterial.

The Court: Objection sustained.

We have learned that one of the guns allegedly tranported was delivered to Mr. Price and one of the guns was delivered to Mr. Klaich.

Q. Mr. London: Is there anything in the statement which has been offered in evidence as Exhibits 8-A through E with reference to Mr. Klaich or Mr. Price?

Mr. Boecker: I submit the Exhibit speaks for itself without asking the witness.

Mr. London: The witness has referred to this, Your Honor. He has already stated he is the man that dictated the biggest part, if not all, of this statement. I am just asking him for clarification on that point.

Mr. Boecker: I object to the question.

The Court: Objection sustained.

I am sure we have a statement in the FBI file from Mr. Klaich. There is nothing in the statement supposedly given by Mr. Cannella about Klaich or Price to the effect that they got one of the guns involved.

Redirect Examination, by Mr. Boecker.

If, on the occasion of this interview, I was wearing a side arm I had my suit coat over it. I at no time exhibited a side arm to Mr. Cannella.

Recross-Examination, by Mr. London.

I do not remember if I was wearing a suit coat at the time of the interview. It is regulations that if we wear a side arm we wear a suit coat. That would have been followed.

I gave the instructions to have Mr. Cannella brought into the office. The agents got out to his house to pick him up at approximately seven-fifteen and he got into our office at about nine-thirty.

EARL C. PORTER testified as follows:

Direct Examination, by Mr. Boecker.

My name is Earl C. Porter. I am a Special Agent, Fed-[fol. 165] eral Bureau of Investigation and have been with the Bureau for thirteen years. During the course of my official duties I had occasion to call upon defendant Cannella for an interview. It was on April 10, 1956. We went to his home to see him. I was with Agent John Bush. We arrived at Cannella's home at about seven-thirty to seven forty-five. Cannella was outside of his home getting ready to get into a taxicab. There were children with him near the car and we pulled up beside and I told him we would like to talk to him. He said he had to take some children to school so we told him, all right we would follow him down to the school, which we did. He let the children out, we pulled around the corner and he pulled around shortly after and parked behind us and got in our automobile. We told him that we wanted to talk with him about some guns which were sold in Granite City, Illinois, and we told him that he did not have to talk to us about them and he was entitled to an attorney and did not have to make any statement, and any statement he might make possibly could be used against him.

Q. Mr. Boecker: What response did he make, if any?

Mr. London: I object to that as being hearsay evidence, incorporating all our previous objections made to Agent Mos[illegible]'s testimony.

• • •

The Court: Very well. Your objection may run to all this line of testimony.

The Witness: Mr. Cannella readily admitted buying some guns.

The Court: Yours also.

Mr. Shenker: Yes, Your Honor. In other words, there is no point of me repeating it, the same thing I made with reference to Agent Moss, including, Your Honor, the same requests that I made. Thank you.

Cannella said that early in December possibly, 1955, he went to Granite City, Illinois and purchased what first he said were two guns, and he stated that he believed he paid about $180 for them and at which time he stated that in view of that amount of money that it probably must have been three guns he purchased and he paid approximately, [fol. 166] he said, about $180 for them. Then he brought them back to St. Louis and put them in the safe at the Ace Cab Company. We remained at the curb talking for about forty-five minutes to an hour. After he told us this, he told us that he had not seen the guns.

We wanted him to come down to the Federal Building for a little further interview and questions. We asked him if he would come down to the Federal Building for further interview.

Q. And what did he say?

A. He said he would. He agreed.

Mr. Shenker: Your Honor, there is only one point I think the record ought to show and I am sure that Mr. Porter will so state that all of these conversations that took place with Mr. Cannella were not in the presence of Mr. Costello, were they? A. No, sir.

Mr. Shenker: That is right, and Mr. Costello was not present.

The Court: At any time on that day, was he?

The Witness: Not to my knowledge, sir, no, sir.

* * *

I rode down to the Federal Building with Mr. Cannella in the front seat of his cab and Mr. Bush followed in a Government automobile. We made one stop on the way at a little cafe on Lillian Avenue. I stopped to call the office and Mr. Bush and Mr. Cannella also came in. Mr. Cannella and Mr. Bush had coffee. We then proceeded to

the Federal Building. We got to the Federal Building at about nine-thirty. I was present during the further interview in the office at which Mr. Moss was present. I would think I was there most of the time. I was there while Mr. Moss dictated to one of the stenographers. Mr. Moss, Mr. Cannella and myself were in the office and Mr. Moss called his secretary in and she took it down in shorthand. [fol. 167] Cannella related the information to Mr. Moss and myself orally. We made notes and then it was transcribed, I mean it was later dictated in the form of a statement. The dictation was an accurate statement of what had been said there. The dictating was done principally by Mr. Moss. Mr. Cannella interrupted, I would say, to make a minor correction or two. I then saw the transcription by the stenographer after the dictation.

Government's Exhibits 8-A, B, C, D and E is a statement by Mr. Cannella. It is the transcription made on that occasion. It accurately relates the information that was given by Mr. Cannella in our office. Mrs. Marie Lee Jennings was the stenographer.

In connection with my various assignments, in my official duties, I have had occasion to pass and observe the Ace Cab Company office particularly during the latter part [fol. 168] of 1955 or January of 1956. That is the place of business of defendant Costello. I have observed a black 1956 Cadillac convertible parked outside there from time to time. I know the license number of the Costello Cadillac, the one registered in the name of Barbara Costello, and the black Cadillac that I observed on the lot is the one with that license number. I have seen it there maybe a couple of times a week. I did not go there every day to look for it. Prior to that I have seen a blue Cadillac parked at Costello's place of business. If I recall correctly, it is the same license number registered in the name of Mrs. Barbara Costello. I would not know how many times exactly I saw the blue Cadillac, but not too many times. I did not see it there for a period of any great length of time, maybe about two months. I would see it there about two or three times a week. I did not go by there every day for the purpose of looking for it. That is just my passing observation.

The stenographic notes that were transcribed into Government's Exhibit 8 have been destroyed.

Q. Mr. Boecker: Is that pursuant to a regular practice, or what is the situation?

Mr. Shenker: Well, we will object to the question whether it is pursuant to a regular practice or not, if the Court please.

The Court: You say you will? Will you object to that?

Mr. Shenker: Because if the stenographic notes are destroyed, the jury can draw a conclusion.

The Court: They might have an opportunity of drawing a conclusion from getting all the facts.

Mr. Shenker: Your Honor, that is something that would not—what the practice is with the FBI, there is no way defendant would know.

The Court: It might make some difference whether or [fol. 169] not they were destroyed in accordance with the usual procedure or whether it was something different. I think it is important to know that. You may answer.

The Witness: They have been destroyed and they are destroyed at intervals.

Q. Mr. Boecker: Now, with regard to whether or not that is a regular practice, will you give your answer, please? A. It is, yes, sir.

Cross-Examination, by Mr. London.

I did not have custody of the stenographic notes. I was one of the agents that went out to talk to Mr. Cannella. I talked to him in the car before bringing him into the office and I was also present during the entire discussion in the office. Mr. Cannella did not say he went to Earl Lewis's gun shop to purchase these guns for himself, Mr. Klaich and Mr. Price. At that time he did not say that Mr. Costello knew nothing of his buying the guns. He later on did say that Mr. Costello knew nothing of it.

In none of my conversations did he say that Costello knew nothing about the purchase of the guns. He did not say that Costello had not given him any money. He said that Costello did give him some money and he said that Costello was with him on one occasion. He first said that he had used his own money. He did not mention the name

of Klaich and Price. It was a number of days later that I first learned of Klaich and Price. I did not interview Klaich and Price on the same day that I interviewed Cannella. I don't think anyone else did, either.

When I first spoke to Mr. Cannella it was in an EBI car which was a regulation FBI car. The conversation lasted thirty to forty-five minutes. From there we went to our office. I rode with Mr. Cannella in the cab. Mr. Cannella was not under arrest, but I rode with him. I told him that we were going to the Federal Building. My partner drove the FBI car.

The FBI car had a two-way radio in good operating condition. We stopped so I could make a telephone call to the office. The call was made from a cafe. I don't re- [fol. 170] call who went into the cafe first. Possibly me. As I recall when we had the coffee, the cab was not there. The cab was still parked by the school. We decided to get some coffee and went by one place and I also wanted to make a call. The coffee was mentioned by one of the three, I would say between Mr. Cannella and Mr. Bush, and then that was not open and we went to this other place. I think the three of us went in an FBI car and then we decided, Mr. Cannella agreed to come down to the office. Then we drove back a few blocks or four, whatever it was, and that was when Mr. Cannella got in his cab. I got in with him and Mr. Bush then followed us down. I testified that we were on the way to the FBI office when we stopped to make the phone call. It was all part of one operation. The FBI car did have a two-way radio.

Mr. Cannella mentioned a wedding in our conversation in the car, before we got to the office. I did not check that as soon as we got to the office. The information concerning the wedding was checked. It was checked that morning but I don't know just when. Mr. Cannella's statement was transcribed, but not everything that he said. The first portion of his statement in which he spoke of a wedding was not transcribed to my knowledge, only the part in which he implicated Mr. Costello was transcribed. I know of no shorthand notes that were made of the first part of his statement. The cab in which I rode with Mr. Cannella had a radio. I do not know whether it had a transmitter or not. I do not recall Mr. Cannella calling into the office and telling him he would be out of service. He possibly

did. I did not say anything to him to prevent him from making that call.

When Mr. Cannella was confronted with the discrepancy concerning the date of the wedding, he then changed his entire story. That is all he was confronted with and nothing else was said to him to my knowledge. There was no persuasion or anything of that nature. He was just told that he was incorrect as to the date of the wedding and he then completely changed his story. It is not an FBI policy to take a statement in question and answer form. I know it has been done but I would not think it is a general policy. I think most of Mr. Cannella's statement [fol. 171] are Mr. Cannella's words. The facts are his words. There are probably some words that he did not say such as the initial paragraph in the statement.

Q. Mr. London: Now, if Agent Moss testified that most of the statement was dictated by him and was his words, would that be correct?

Mr. Boecker: I object to asking one witness to pass upon the testimony of another.

The Court: Objection sustained. I think a good deal of time is being used up on this line of cross-examination.

From our office, Mr. Cannella went to Dr. Berman's office out on North Grand. He was taken there by FBI agents including myself, Joe Pearson and James Talley. We drove him out to the doctor's office and after the doctor was with him for awhile we left and returned to the office. We stayed until an ambulance was called and the ambulance departed with Mr. Cannella. I know nothing more about what happened to Mr. Cannella on that day.

I would say I was present practically all of the time with Mr. Cannella in the FBI office. No agents were assigned to protect Mr. Cannella at any time after his interview with the FBI.

The Court: Was any request made to the FBI that there should be any agents assigned to protect him?

The Witness: None.

Mr. Cannella was ill at the time he left the FBI office. I took him to the doctor's office from the FBI office and he left the doctor's office in an ambulance.

MARY LEE JENNINGS testified as follows:

Direct Examination, by Mr. Boecker.

My name is Mary Lee Jennings and I am a housewife. I was formerly employed by the FBI as a secretary. I was employed by the FBI on April 10, 1956. I recall on that date being given dictation by Mr. Moss in the presence of Mr. Porter relating to Joseph John Cannella. As I remember, Mr. Moss questioned Mr. Cannella and as he answered those questions, Mr. Moss repeated them to me. The actual dictation was from Mr. Moss but the other man talked to Mr. Moss. I correctly took down in shorthand [fol. 172] the dictation that was given to me and I thereafter correctly transcribed the notes. As far as I know, the notes that I took were destroyed.

Cross-Examination, by Mr. London.

I did not personally destroy the notes. After a book is finished, it is given to the head supervisor who keeps it in her custody for a certain length of time and then they are destroyed.

I went into the room where Mr. Moss and Mr. Cannella were on the morning of April 10 at around noon. I know of no other secretary or stenographer who went into the room before I did. Agents Porter and Moss were in the room. My notes were not in question and answer form but were in straight dictation form. I don't recall if Mr. Moss was reading from some notes that he had as he was dictating to me. He would ask Mr. Cannella questions, Mr. Cannella would answer them, and the statement was made from that. I heard the questions and the answers and the statement made for me to take down by Mr. Moss. After he gave me the statement, he asked Mr. Cannella if that was right and Mr. Cannella answered throughout.

I did not notice that Mr. Cannella appeared ill. He said nothing about being ill. I imagine I was in the room about a half an hour. I would say my notes were a combination of Mr. Moss's words and Mr. Cannella's words. The actual dictation, however, came from Mr. Moss and the actual notes of what transpired in that room are no longer available.

SIDNEY GOLDSTEIN testified as follows:

Direct Examination, by Mr. Boecker.

I am acquainted with Joseph Costello. I recall visiting the Costello home on an occasion when we went to get a battery sometime around February of last year. I believe it was on a Sunday after he had returned from vacation. That would be February of 1956. We went to the Domian Service Station on 800 North Lindbergh or South Lindbergh and obtained a battery for an automobile. We went in the car that I was driving.

[fol. 173] Q. Do you remember whether Mr. Costello's car was at his house on that occasion?

A. No, at the time that he had asked me if I knew where to get a battery I had suggested to him to go in my car, and at the time I was questioned by the FBI agents I had not remembered everything about the case. I was taken away from my place of employment; I was not allowed to call my wife or my lawyer, and they kept questioning me for about two hours and had me kind of upset, but I do remember when we went out on the porch Joe said it was a good thing to use our car because his car was not there, he had loaned it to somebody.

Q. But prior to this I believe you made a statement just to the contrary, have you not, Mr. Goldstein?

A. No, sir, no, sir.

Q. On this occasion when you said you were questioned by the FBI didn't you say you knew Joe's car was there?

A. Absolutely not, and they know I didn't say it. Mr. Porter, I believe he is in the court, he will remember that.

Q. I will ask if on the occasion of your interview you were asked to sign a statement? Is that your signature?

Mr. Shenker: I want to object to this line of questioning, may it please the Court, on the ground it is totally incompetent, irrelevant and immaterial, an improper attempt to impeach the Government's own witness.

Mr. Boecker: I claim surprise, Your Honor.

Mr. Shenker: We submit, if the Court please, that this is not done in good faith, that this is a matter that has been pending now since April 1956, and certainly as a condition of the government claiming surprise they must

show good faith and good diligence in the preparation of the matter of the case.

Mr. Boecker: For the purpose of making a showing of good faith, may I direct the court's attention to a three-page statement?

* * *

[fol. 174] A. That seems to be my signature. May I say something, Your Honor?

The Court: You say it seems to be your signature?

The Witness: Yes, sir.

The Court: Are you in doubt about it?

The Witness: No. That is my signature.

The Court: Very well. What do you want to say?

The Witness: I did not dictate this. The FBI agents dictated this, and then they asked me to sign something, that they changed some wording—I believe it would be on the paper.

Q. Mr. Boecker: Now, let me show you a page that is marked 2. It has got some initials in the margin. Are those your initials? A. Yes, sir.

* * *

The Court: Did you sign them?

The Witness: I initialed these. They asked me to initial this, and they asked me to write this wording.

The Court: You initialed it?

The Witness: Yes, sir.

Q. Mr. Boecker: I will ask you if on that occasion you did not say, "We used my car in going to get the battery although Joe had his Cadillac there at the time because I was driving an old Cadillac and jokingly said, let's take a ride in a good car"?

A. Absolutely not, and I told the FBI agents——

The Court: Just a minute. You deny that unqualifiedly, that you made any such statement?

The Witness: I did not tell them that the car was there, if they said that, I did not tell them his car was there if my life depended on it. I told them——

The Court: Did you make any protest before you initialed the page?

The Witness: I did not even get a chance to read that real good. He said, "We are going to change a couple words".

The Court: Didn't you look in it to see what change was made?

The Witness: It says when I was visiting Joe's house, the change he asked me to make.

The Court: But before you signed the statement didn't [fol. 175] you read it over?

The Witness: No, I didn't read the whole thing over when I signed it; they were dictating to a stenographer.

The Court: All right. But you signed it; and didn't you read it before you signed it?

The Witness: Completely, no, sir.

The Court: Why not?

The Witness: They had me all nervous and upset; they would not even let me get——

The Court: How old are you?

The Witness: Forty-one years old.

The Court: What is your business?

The Witness: Used automobiles.

Q. Mr. Boecker: Mr. Goldstein, I am going to ask you if that was not the same day that you came to the Federal Building in answer to a subpoena to testify before the grand jury?

A. The day that the statement was taken?

Q. The day that the statement was taken? A. Yes, sir.

Q. And that you complained to me because it was a long time getting to your turn, and I said if you cared to make your statement to the FBI we will excuse you as a witness; do you recall that?

A. No, you did not say that, Mr. Boecker.

Q. What did I say?

A. I asked if I could get a drink. The FBI agents went out in the hall. You and another party were standing in the hall, and you made some remark to Mr. Porter, I believe it was, in the hall, you said, did you get something; he said no; you said I guess we won't use it, it is getting late, works real hard, or something, the grand jury.

Q. You were waiting to be a witness before the grand jury, were you not?

A. I was subpoenaed to be a witness for the grand jury. I never did get in the grand jury room. They kept me in the FBI office.

Q. You said you were very grateful to have a chance to make your statement and get on about your business?

[fol. 176] A. Absolutely not, Mr. Boecker. I never said nothing like that.

Q. You were allowed to give a statement and you were excused?

A. No. You told them if they wanted to take a statement they could take a statement.

Q. I told you, did I not?

A. No, you talked to Mr. Porter; he was out in the hall when we come to get a drink at the fountain.

Q. You are free, white and 21; I would have to talk to you.

A. No. The only thing you did to me was nod your head, and you made a remark the grand jury was there, they worked hard all day, and you figured it would be better if they take some kind of statement.

Q. It was not your wish to give a statement?

A. Absolutely not. I was subpoenaed away from my place of business where I was working. I was not allowed to call my wife or attorney or any——

Q. Who do you mean? A. The marshal.

The Court: What marshal?

The Witness: The marshal that come with that subpoena.

The Court: What did he say?

The Witness: He come in, said "Sidney Goldstein here". I said, "I am Sidney Goldstein". He said, "Come with

me". I said, "What for?". He said, "I got a subpoena for you to be a witness before the grand jury". I said, "Right now?"; he said, "Yes". I said, "Can I go get cleaned up". He said. "No". I said, "Can I call my wife".

The Court: Do you know what deputy marshal it was?

The Witness Yes, I believe I do.

The Court: Who was it?

The Witness: I believe his name was Davison.

The Court: Send over and have Mr. Davison—ask Mr. Davison to come in here, let the man have a chance to see him.

Q. Mr. Boecker: Your story is that you were apprehended by the marshal and not allowed to communicate with anybody, and brought you down here. Were you [fol. 177] held in custody when you got here?

A. No, no. They took me to the office.

The Court: Be seated, Mr. Shenker.

Mr. Shenker: Your Honor——

The Court: If you want to make an objection.

Mr. Shenker: That is what I stood up for. The word "apprehended", I did not hear any testimony about "apprehended", and I am certainly objecting to including in that question a word that was not used, or was there any testimony about.

Mr. Boecker: I submit that the word fairly describes what this witness has stated. I submit it is not a fact but I submit that is what the witness is trying to tell us.

The Court: I don't know whether I got the way that was used. I will sustain an objection to the use of the word if he makes an objection to it.

Q. Mr. Boecker: It is your statement, Mr. Goldstein, a deputy United States marshal commanded you to come here without giving you the opportunity to communicate——

The Court: Wait a minute. If Mr. Davison is here let him be present and hear the rest of this. As soon as Mr. Davison gets back from the jail have him come in here.

* * *

(Question read.)

A. Absolutely, positively.

Q. Mr. Boecker: What time did you get here?

A. Well, that is a question, that was in the afternoon, it was after dinner time. In fact, when I had asked Mr. Davison if he was going to bring me back or shall I take my car, he said, "Well, I will follow you down. You go to 12th and Market". When we got down to the neighborhood, he said "Stop around there". We went in a restaurant. He had a chicken dinner, and I sat there and waited for him. It was after two o'clock, I believe.

Q. How long were you in the Federal Building before you made a statement?

[fol. 178] A. Well, they took me right up to the FBI offices, whatever floor that would be on. They started questioning me, two men started questioning right away.

Q. Actually you were subpoenaed to appear in a certain room, were you not, which is the grand jury room?

A. That is what the marshal told me, I was subpoenaed to go to the grand jury.

Q. Didn't you go to that room?

A. No, sir, I never was in the grand jury room unless the FBI offices are the grand jury room.

Q. You were never in the ante-room to the grand jury?

A. The only place I went was to their office or the fountain to get a drink. I think Mr. Porter accompanied me each time I went out in the hall to get a drink.

Q. Do you say Mr. Davison took you directly to the FBI, not to the grand jury? A. That is right.

Q. Did you make any protest about that action?

A. Yes. I believe it was Mr. Porter, or the other man, I don't remember which other man was there. I do remember Mr. Porter very well, and he says, "Are you answering these questions of your own free will". I said, "No, you subpoenaed me down here, that is not done of my own free will. I would rather be back on my job working".

Q. It was at your request to get back to your job, that was stated to me by you, I said, "If you want to make your statement to the FBI we will excuse you as a witness"; isn't that the fact?

A. You were talking to Mr. Porter. You said, "If you want to take a statement it will be all right", because the grand jury was working overtime, or it was late, or something.

Q. And you complained about being late?

A. No, it was too late for me to complain about being late.

Q. Is that your excuse for saying that you did not see these things in here?

A. I told Mr. Porter if my life depended on it I could not tell whether that car was there or not, and Mr. Porter [fol. 179] knows I told him that. I never once told him his car was there.

Q. Yet you signed and initialed a statement?

A. They said, "Well, we will change that. You write the words I tell you to write", and the words that they told me to change was, "I was visiting Joe's house".

The Court: Did you change that in your own handwriting?

The Witness: He asked me to make a change.

The Court: But you made a change in your own handwriting?

The Witness: Yes.

The Court: Yet knowing it to be false?

The Witness: No, no. He said I was visiting; I did not write his car was or was not there. I wrote I was visiting Joe's house.

Q. Mr. Boecker: As part of that same statement there is included the statement, "Joe had his Cadillac there". Do you remember even writing that in, black and white, isn't it?

A. I did not write that, Mr. Boecker. I did not write that, because when he dictated it I was trying to follow the dictation to find out what they dictated.

Q. Who dictated it?

A. Both of the men were saying—Mr. Porter mainly was doing it.

Q. Who was the other party?

A. Mr. Porter would know the other, I don't know the other agent, I don't recall. Two men were in there, one would ask a question and leave the room, the other would stay with me, and he would come back and the other would leave the room; he would come back and Mr. Porter would get up and leave the room; and they even questioned me about how many phone calls I made from the house. I said "I think I called two". I called the filling station, manager of the filling station, to get the o. k. to get the battery. He come back and said, "Are you sure you made only two". I said, "I am pretty sure". He come back and said, "Are you positive". I said, "Wait a minute. I called the station back to see if the manager cleared him to give me the battery at a discount". See, their place of business was right across the street from where I was working. I never once told any-[fol. 180] body the man's car was there because I didn't know, for the life of me I could not put his car there at the house or any place.

Q. The words in longhand, "I have read and corrected statement and it is true"; did you see those words?

A. The FBI, they dictated those words for me to write. They said, "I have read and corrected statement".

The Court: He used those words?

The Witness: I didn't get a chance to read it all over completely.

The Court: You wrote it?

The Witness: Yes, the same as I wrote this.

Q. Mr. Boecker: Why?

A. I didn't know; I really didn't know.

Q. Why did you write them?

A. Why did I write them? I am sitting in an office being questioned about something I had nothing to do with, by two men.

Q. Why did you write them?

A. For almost three hours.

Q. Do you mean if somebody tells you to tell a lie you will go ahead and do it, is that what you mean?

A. No, sir.

Q. Such as you are doing here, because somebody asked you to come in here and lie before this judge and jury?

A. I am not lying. I told Mr. Porter I could not tell him if that was there.

Q. You say you told them that?

A. They have ways of doing, I guess, wording. I am not a lawyer. They refused to let me get a lawyer.

Q. Do you have to be a lawyer to understand this statement, Mr. Goldstein, "Joe's car was there". Do you have to be a lawyer to understand that?

A. You have to be a lawyer to understand your rights, what you write, and you are all mixed up, and all nervous.

Q. Did you tell them you wanted a lawyer, you were all mixed up and wanted a lawyer to tell you what to say?

A. Did I tell the FBI that?

Q. Yes.

A. No, I told them I was not down there on my own free will.

[fol. 181] Q. What did they say when you said you were not there on your own free will?

A. I think they kind of laughed.

Q. Was anybody keeping you from leaving if you wanted to leave?

A. Two FBI agents; they would not leave me walk out in the hall to get a drink.

Q. What do you mean, they would not leave you; nobody laid a hand on you; nobody locked the door behind you, did they?

A. Did they lock the door behind me?

Q. Yes.

A. No, but I asked could I get a drink, and they went out first, he opened the door first and went out and stood there while I took a drink, and followed me back in the office.

Q. Did you say "No"?

A. I was under subpoena to appear before the grand jury.

Q. At any time since this has happened, which was June 27, 1956, have you ever raised a protest about the improper behavior that you say they indulged in, have you ever once protested?

A. I never thought it was necessary.

Q. Your rights were violated, you were forced to do something and tell lies, and you never once protested, in all the months which have passed from then?

A. I have never been subpoenaed.

The Court: Just a minute, Mr. Boecker. You are going too fast.

A. I had no idea I would be subpoenaed on anything.

Q. Mr. Boecker: Do you mean to say that you let that violation of your rights go without any whisper of protest until you appeared here?

A. I had no occasion to protest anything. I had no idea that I was going to be called; and I protested to Mr. Porter in the hall in this court about the conduct, of the way I was treated, and Mr. Porter knows that.

Q. What did you say to Mr. Porter, what in substance did you say to Mr. Porter?

A. I protested two things. Mr. King said, he told me to get a plane ticket and get out of town. I said, "What for".

[fol. 182] The Court: Who told you that, Mr. King?

The Witness: Mr. King right there.

Q. Mr. Boecker: This man sitting right there?

A. That is right.

Q. Told you to get a plane ticket and get out of town?

A. That is right. I was going to use the phone. I was sitting in a booth. He came over and said, "You better get a plane ticket and get out of town, quick." I said, "What for?" He said, "You helped us a lot, you talked a lot to us." I said, "I never told you people anything that could help you or anybody, or the other party." He said, "That's all right." Then that evening, the next day I talked to Mr. Porter in the hall. I told Mr. Porter, I told about the deputy marshal, or marshal as it may be, about his conduct when they picked me up. I said, "I am not a criminal."

The Court: What was the deputy marshal's conduct when they picked you up?

The Witness: He had come in—

The Court: Oh, here is the deputy marshal, Davison, now.

The Witness: That is right. I told Mr. Porter about it.

The Court: Let's hear again just what was it that you complained about, about the conduct of deputy marshal Davison.

The Witness: When I was, I was working at 2680 South Hanley. He walked into the office and he said, "Are you"—another man by the name of James Elman was sitting in the office. He said, "Who is Sidney Goldstein?" I said, "I am." He said, "Come with me. I got a subpoena to appear before the grand jury." I says, "What is it all about." He said, "I don't know, you just come with me." So I says, "Do I have to got like this?" I was in dirty clothes, greasy clothes. He said, "Yes." I said, "Can't I change clothes even." He said, "No." I said, "Well, I will call my wife and I will tell her where I am going. She will know where I am at in case I am late to home for supper." He said, "You don't call nobody." I said, "Can I call a lawyer." He said, "No, you don't call nobody, you come with me." I said, "Are you going to bring me back, or are you going to take your car." He said, "You can take your car and when you are finished you can [fol. 183] drive back yourself." We come downtown and went to a restaurant right by the Federal Building, I believe it was on Walnut, went in the restaurant. He ate dinner, said he didn't eat dinner yet. I had a cup of coffee while I was waiting for him. He brought me right upstairs to the office, the FBI agents, I guess that is the office.

The Court: What about the conduct you complained of?

The Witness: He said it was my own free will. I told him no, and questioning about whether I could get a lawyer, and Davison told me I could not call anybody, I had to go right with him.

The Court: What did you say to him about wanting a lawyer?

The Witness: I said, "Can I call a lawyer; if I can't call my wife can I call a lawyer." He said, "You don't call anybody; you come right with me; you are going before the grand jury."

Q. Mr. Boecker: And then you were immediately turned over to Mr. Fisher and Mr. Porter, is that correct?

A. I don't know. I know Mr. Porter's name. I don't know the other man's name.

Q. Well, the other one that signed as a witness here, is that right? A. Well, whichever the other man was.

Q. The other man is the one that signed as a witness here? A. I don't know the other man's name; there was two men in that office.

Q. And they both signed as witnesses to this statement? Did they both sign as witnesses to this statement?

A. I don't know. I don't know. Let me see it. I don't know if somebody else signed it. I don't even know that. If they signed it they signed it.

Q. Tell me again about that longhand wording at the end in your handwriting, how did you happen to write that?

A. The same as I wrote the other one. He said, "You write in your own hand."

The Court: Who is "he"?

The Witness: One of the agents.

The Court: Which one?

The Witness: Your Honor, they were both questioning me, and they would get up and walk out of the office, [fol. 184] one of them would, and one would sit there, and he would come back and the other would get up and walk out of the office, and he would come back and ask me some questions; and they kept coming back and forth. Very seldom were there two in there at one time of all the time I was in the office.

* * *

Q. That happened in June?

A. I can't remember exactly when, but it was not in February or April; it was quite a time after they picked me up with the subpoena.

Q. Well, there is a date on here. Is that the right date?

A. Well, whatever the subpoena was. I didn't—they kept the subpoena.

Q. They kept the subpoena?

A. Well, the office where—they even paid me four dollars fee for coming down.

Q. That is your witness fee?

A. Yes, the witness fee they paid me. Mr. Porter, I believe, took me down to get that; I believe it was Mr. Porter.

Q. Well, there is a date on here, June 27, 1956.

A. Well, that would be the date they subpoenaed me.

Q. Is that right; and it is now April 15, 1957, isn't it?

A. That is right.

Q. That is about, almost ten months, isn't it, since this has happened, and during all that time you have never protested about this improper conduct, have you?

A. I had no reason to protest. I had no idea I would be subpoenaed as a witness.

Q. Have you ever talked about this statement of your interview to anybody else ever?

A. Did I ever talk about it? Yes, I talked about it. I talked about it to a personal friend of mine, Mr. Leroy Coplan; I talked to my wife about it. I even mentioned something to Joe. It was during that week when I had been questioned. I was over to his house for some occasion, pick up my wife and baby. I said I had been subpoenaed by the Government to appear before the grand [fol. 185] jury, instead of that the FBI questioned me, and we didn't talk about it.

Q. You didn't tell them what you said in your statement?

A. Except they were trying to establish about the car. I said, "Joe, I don't remember if your car was there or not, I just didn't remember."

Q. But in that statement you said you knew it was there.

A. No, I did not. I even protested to Mr. Porter and that other man. I said, if my life depended on it, you would put a question to me right now I could not tell you yes or no. I absolutely told them that, the very words. They know I told them that, the very words. If he had any honor about it they could get up and show it right now. I did not know whether his car was there or was not there. I had no reason to lie about this to anybody. In fact, when I was subpoenaed as a witness I told Joe the Government subpoenaed me as a witness. He said, "Sidney, let's not talk about it, if you are a witness for the Government, don't say nothing about the case to me"; and I went on about my business.

The Court: Who said that to you?

The Witness: Mr. Costello.

Q. Mr. Boecker: What lawyer did you have in mind when Mr. Davison was with you that day?

A. One or two men I would always ask to defend me for anything, if I needed defending for anything, would be Mr. Morris Kessler or Ray Harris, who happens to be, I think he is coroner of St. Louis County.

Q. Then when you were not allowed to call them by what you say as to Mr. Davison's conduct, did you make any other request of anybody to be allowed to call either one of those two lawyers?

A. I just made the protest in the office, when they asked me, "Are you here of your own free will"; I said no, I was subpoenaed.

The Court: Who asked you that?

The Witness: Mr. Porter or the other agent. There were one or two agents. They were both sitting at the table questioning me. They said, "Are you here of your own free [fol. 186] will." I said no, I was subpoenaed to appear before the grand jury. They said, "I am going to ask you some questions," Mr. Boecker, we were out in the hall getting a drink, you will remember.

Q. Mr. Boecker: I told you, didn't I——

A. You were not talking to me.

Q. Didn't I talk to you that day?

A. Just when you made a remark about the grand jury being so tired or something. You said, it is getting late, we worked so hard today, we will just leave them take a statement.

Q. Didn't I ask you if you wanted to give a statement?

A. No.

Q. And didn't you say you would be glad to do it, get it out of the way, it would get you back to your business or job, you would be glad to do it so you can get on your way?

A. Mr. Boecker, you will recall that it was after five o'clock, it would not do me no good after five o'clock.

Q. I don't know whether it was or not. Didn't you tell me you wanted to make a statement in the FBI office rather than the grand jury in order to speed it up?

A. You asked me if it was all right. I said it was all right, I could not get back to my job, it was after five o'clock. It was away after five when I left here.

Q. Did you tell me you wanted to call a lawyer? A. No.

Q. Did you tell Mr. Porter you wanted to call a lawyer?

A. No, I did not.

Q. Did you tell the other agent, whoever he is, that you wanted to call a lawyer?

A. No, I did not because if the marshal would not allow me to why would they allow me to.

Q. Was there a stenographer came in while you were there to take notes?

A. At the end of all the questioning they had called her in.

Q. Was it the same young lady as the one in the witness room?

A. I can't recall. I didn't recognize her when I first [fol. 187] saw her Friday or Thursday.

Q. When she was present did you say you were not there of your own free will? A. No; just the two agents.

Q. Did you tell her you were not there of your own free will? A. No.

Q. In her presence did you say you wanted to call a lawyer, Mr. Kessler or Mr. Harris?

A. No, no, as I said, Mr. Davison said I could not talk to anybody, could not call anybody. I thought it would be useless to bring up the question.

Q. Once having it on your mind that you wanted to call a lawyer, having left that place that day did you call Mr. Kessler or Mr. Harris about what happened here?

A. No, to be very honest with you I was too upset to think about anything.

Q. Why were you upset?

A. Why, the way the FBI was questioning me.

Q. Because you told the truth that day, is that why you were upset?

A. No, absolutely not. If they had put down the way I told them that would be the truth absolutely.

Q. Do you mean to tell me you did not know what was in that statement?

A. Have you ever tried to read anything when you are nervous and upset?

The Court: You are not cross-examining.

Q. Mr. Boecker: Mr. Goldstein, since you are asking a question, I will tell you I saw you that day, you were not nervous and upset, were you? A. I think I was.

Q. Are you nervous and upset now? A. A little bit.

Q. It does not interfere with you telling a narrative of what happened, does it? It does not prevent you from telling what happened, your nervousness?

[fol. 188] A. I am trying to tell the truth.

Q. You were no more nervous that day than you are now, were you? A. Oh, I think I was.

Q. Well, how did you show that nervousness?

A. It was the first time I have ever been picked up in the middle of a job to be whisked away, you might say, downtown in the middle of the afternoon.

Q. Well, you were subpoenaed.

A. That is what I say; but I was whisked away, just why I was subpoenaed, I thought you would at least get time to get cleaned up. I was not even allowed to wash my face. He said, "Come, go with me now."

Q. Is that an excuse for not telling the truth, that you did not have your face washed?

A. I am telling the truth, and Mr. Porter is in this court. He can tell you I told the truth. I made the statement to him, if my life depended on it I could not say whether that car was there or not. His question to me was, when you drove up to Joe's house do you recall that, to see this car. I said it so happened we don't go there just to see Joe; we go to see his wife, and my baby plays with his kids.

Q. You knew they were interested in finding out whether or not you observed his car?

A. I didn't know it until after about an hour questioning. I told them I could not tell, if my life depended on it I could not tell them if his car was there or was not there.

Q. Well, if after an hour's questioning you knew that was the fact they were interested in, and if that fact was not stated correctly why did you sign this paper?

A. I didn't read that paper over, but they kept, they told me, here, we want you to write this, you write the words we tell you. I said, it said when I visited Joe's home.

Q. Now, the words, I have read this statement and corrected it, and it is true; you read that, didn't you?

A. Yes, I say I tried to read it. I didn't get a chance to get it all read. I didn't get a chance to get it all read.

[fol. 189] Q. Then why did you sign it?

The Court: You wrote that in your own hand, did you not?

The Witness: Yes. My own handwriting that is on there, but, Your Honor, I am saying again I did not tell them people, Mr. Porter and that other man, that his car was there, I did not tell them that, I did not give them them words.

The Court: What words did you give them?

The Witness: If my life depended on it I could not say for sure if Joe's car was there or not. He said, "Could his car be across the street?" I said it is possible because sometimes he parks it across the street from his home, but I could not tell you if it was or was not there. More than once I told Mr. Porter that, more than once. Mr. Porter is right here in this court. He knows I said them words, he used them words.

Q. Mr. Boecker: Are you finished? A. Yes, sir.
Q. How long have you known Joe Costello?
A. Since 1951.
Q. Are you a good friend of his?
A. I am married to a cousin of Joe's.
Q. Are you a good personal friend of his?
A. Well, friendly.
Q. Do you visit at his home? A. Yes, quite often.
Q. Are you a good friend of his? A. Quite often.
Q. I say you are a good friend of his, are you?
A. I take it to be.

Mr. Boecker: That is all.

Mr. Shenker: I ask at this time, if the Court please, that all testimony pertaining to the statement allegedly made by this witness to the FBI be stricken.

The Court: On what grounds?

Mr. Shenker: On the ground it is totally incompetent, irrelevant and immaterial.

The Court: Overruled.

[fol. 190] Cross-Examination, by Mr. Shenker.

From the time I was approached by Mr. Davison until the time I left the FBI office that evening I was never alone with the exception of the trip to the Federal Building, at which time I drove my car and Mr. Davison, by arrangement, followed in his car. Mr. Davison gave me a subpoena at my place of business and told me that I had to go right away. Mr. Davison did not tell me what to say and he said that he didn't even know what it was all about. The only thing he told me was that I had to go right away. We first stopped at a restaurant and he then took me to a room in the Federal Building. I don't recall the number of the room but it was the office of the FBI. He brought me to the room and said, "Here is Mr. Goldstein". He said that to one of the agents.

The agents asked me if I remembered what day I was at Mr. Costello's house and I said I didn't remember and they said, "Are you sure", and I said, "Well, let me think." I was at his house on a Sunday and he asked me to get a battery, if I knew where I could get a battery on Sunday. I said that I thought I did and I got the phone and called the station across the street from where I work and asked if I could get a battery and asked about the price, and further asked if I could get a discount. He said I couldn't and the manager would have to o. k. it. I told the agent if that is the day he was referring to, the day I got the battery, that that was the day I was there and it would be on a Sunday. The agent said that was the day he was referring to and said that was the day before Mr. Costello was picked up by the police.

I am a used auto parts salesman, merchandiser.

Cross-Examination, by Mr. London.

The stenographer was not present in the room during all of the time that I was questioned. After the questioning was completed, they called in the stenographer and dictated the statement.

• • •

Mr. London: The objections of Mr. Shenker made to Mr. [fol. 191] Goldstein's testimony, and at the outset of the

cross-examination, the objection as to each question in that series of questions is allowed to both defendants.

The Court: Let the record so show.

LESLIE S. DAVISON testified as follows:

Direct Examination, by Mr. Boecker.

I am a deputy U. S. Marshal.

Q. Mr. Boecker: How long have you been so employed?

Mr. Shenker: Just a minute. At this time, if the Court please, defendant will object on the ground that it is incompetent, irrelevant and immaterial.

The Court: What?

Mr. Shenker: That any testimony or any questioning of this witness is totally incompetent, irrelevant and immaterial to the points at issue in this case. The government is bound by their witness, having put on Mr. Goldstein, and having elicited answers by him they are bound by those answers, and certainly this is an attempt to unduly and unjustifiably lay before this jury matters which are collateral and are totally incompetent.

The Court: Didn't you hear the cross-examination of this witness? You objected a minute ago. Didn't you hear Mr. Boecker ask him a lot of questions? Didn't you hear him cross-examine him as to that statement that he had signed, a part of which he had written in his own hand? Didn't you hear Mr. Boecker claim surprise, and didn't you hear the court grant his request to proceed along that line as a result of the surprise that he claimed? Objection overruled. Proceed.

Mr. Shenker: Save my exception, Your Honor.

I have been a deputy U. S. Marshal for about 24 years. I was called into court when a witness was on the stand just before the recess. I recognized that witness and I had served a subpoena on him. I have an independent recollection of making that service.

Mr. Boecker: What is your recollection as to what occurred when you went out to serve that witness with a subpoena?

[fol. 192] Mr. Shenker: May we at this time, if the Court please, in order that the Court knows I must preserve my record.

The Court: Preserve your record. The Court desires that you preserve your record.

Mr. Shenker: So may the record show again that we are objecting to this testimony on the ground that that raises a collateral issue, and it is an attempt by the government to impeach the testimony of their own witness.

The Court: Overruled. Proceed.

Q. Mr. Boecker: What is your recollection, sir?
A. Well, I went out——

The Court: You have preserved your record, and it won't be necessary to be reiterating that objection.

Mr. Shenker: Very well. It may go to the entire testimony of this witness.

I went out to South Hanley Road about 11:30 or 11:45 a. m. to an auto parts yard. I asked an old man for Mr. Goldstein and he said he was not in. I asked when he expected him and he said most anytime. About thirty minutes later Mr. Goldstein came in and I served the subpoena on him. He asked, "What does it mean?" and I said, "Right now". He said, "What do you mean", and I said, "Well, you have to come down there right away". He said that he would be with me in a minute and I said that he was not going with me as I was not taking him down there. I told him I would meet him at 12th and Market at the Federal Building. I said that I was going over to the Federal Coffee Shop and eat dinner and I would meet him there. So I left him in his shop and came down and parked my car, went in and when I was partly finished with my lunch, Mr. Goldstein came in and sat at the table with me. He had a cup of coffee and when he was finished, I was finished. I brought him upstairs and put him in the grand jury room, the witness room up there.

The Court: Just a minute. I don't know whether you overlooked it or not, but if the Court correctly remembers the testimony of the witness, said that Mr. Davison told him to go first and he would follow. I wish you would go into that and bring that out.

[fol. 193] Mr. Boecker: Yes, Your Honor, I will go over that and other points.

There was no arrangement made for him to go with me or for me to follow him. He used the telephone twice while I was in that place. The first time he used it, the line was busy and the second time he used it, he was talking when I left. I didn't see him from Hanley Road until he walked into the Federal Coffee Shop. I was there at least fifteen minutes before he came in. I did not at any time tell him he was forbidden to make any phone calls. He did not tell me he wanted to make any phone calls. He did call. He made no statements about wanting to see a lawyer. I don't know who he was talking to when I left.

There is a public phone in the Federal Coffee Shop. Mr. Goldstein said nothing about making any phone calls in the Federal Coffee Shop and I said nothing to him about it. I did not indicate to him or give him any impression that his conduct was restricted while he was in my presence. The only purpose of my meeting him was to show him the proper place to go. I took him to the ante-room of the grand jury. That room is not in any way connected with the FBI. After taking him there, I left him and did not stay. That is all that happened.

Mr. Shenker: I move that the testimony be stricken, Your Honor.

The Court: Overruled.

Cross-Examination, by Mr. Shenker.

The subpoena was a forthwith subpoena. I do not know if Mr. Goldstein changed his clothes before he went down there. The room where I left Mr. Goldstein is on the same floor with the FBI, just down the hall. There were four or five people sitting in the grand jury room. I said, "Here is Mr. Goldstein".

Redirect Examination, by Mr. Boecker.

I said that to two or three FBI agents who were sitting in there. There was also a deputy marshal in there at the time I said, "Here is Goldstein".

[fol. 194] EARL C. PORTER testified further as follows:

Direct Examination, by Mr. Boecker.

I was present at an interview with a witness by the name of Sidney Goldstein which I believe occurred in June.

Q. Mr. Boecker: Do you recall the circumstances that led to your conducting that particular interview?

Mr. Shenker: If the Court please, I submit that this testimony is totally incompetent, irrelevant, immaterial to the points at issue in this case. This is an attempt which is being made to impeach the government's own witness.

The Court: Overruled.

Mr. Shenker: May we, in order that we will not have to——

The Court: You don't need to repeat that objection any more. The Court has ruled, and your objection may run right through to any further testimony of this witness.

Mr. Shenker: Thank you, Your Honor.

A. As I recall, sir, Mr. Goldstein was on the fourth floor, or came into the office, or I don't know if he was with anyone or whether he was not, and I believe you, I believe Mr. Boecker stated that if he wanted to talk to the FBI it would be all right.

I know of no one commanding him to go into the FBI quarters. I don't know how he came in. The first time I saw him in the office was sometime in the afternoon.

Q. Mr. Boecker: What in substance did he say to you about first approaching you or being approached, as the case may be?

Mr. Shenker: Your Honor, there is another situation, certainly relates to hearsay, outside the hearing of the defendant. I want to further preserve my record.

The Court: You may preserve your record; but the court will say to you, here is a witness who has denied matter contained in a statement, some of which was written in his own hand, and the Court feels that the government is entitled—this witness challenged every witness who has testified here, and the Court thinks there is no question in the world but government counsel has a right to go in and bring out the facts; he would be derelict in his duty [fol. 195] and delinquent if he did not do it, and the Court is going to rule the same way right straight through on all these matters, we might as well understand now. Your objection to the testimony will run through all this testimony. Proceed.

Mr. Shenker: Very well.

He was in the FBI office in order, possibly, to keep from waiting to testify before the grand jury. I believe Mr. Boecker told him he could do that. I don't believe Mr. Goldstein was asked whether or not he was there of his own accord. He proceeded to discuss the matters that we brought up. He made no protest about anything that was occurring, or that had occurred to him that day. He said he was subpoenaed to appear before the grand jury. He said nothing to indicate whether he was willing or unwilling to talk to us in the FBI office.

Mr. Boecker: Let me have this marked at this point.

(The document referred to was marked Government's Exhibits 9-A, 9-B, 9-C.)

Mr. Shenker: May the record show that for the first time counsel for Mr. Costello is handed what is marked as Government Exhibit 9-A, and that is, for the first time that is shown to counsel for Mr. Costello or to the defendant.

Mr. London: The same is true as to the attorney for Mr. Cannella.

Mr. Boecker: Would that be 9-A, 9-B, 9-C?

Mr. Shenker: I am sorry, Mr. Boecker—9-A, 9-B and 9-C.

[fol. 196] During the course of my interview with Mr. Goldstein, Special Agent Jack Fisher of the FBI was also present. I don't recall whether or not anyone came into the office during the interview. At one point I called in a member of the stenographic staff and that was in Mr. Goldstein's presence. Nothing was said to or by Mr. Goldstein concerning the calling in of the stenographer.

Dictation was given to the stenographer by either Mr. Fisher or myself, I don't recall. It was done in Mr. Goldstein's presence. He indicated no agreement or disagreement with what was being done. At the conclusion of the typing of the statement, it was exhibited to Mr. Goldstein. He read it and signed it. To all appearances he read the entire statement. He looked at each page. He looked at each page for a sufficient period of time for an observer to get the impression that he was reading the entire page. I don't recall whether Mr. Goldstein made any changes in the statement. As I recall, the pages were initialled by him. His signing and initialling of the papers was witnessed. I witnessed it and Mr. Fisher witnessed it.

Mr. Boecker: May it please Your Honor, I think counsel should have the opportunity to examine this paper carefully before I conduct any further examination. Mr. Shenker says he has not had time to look at it.

Mr. Shenker: I can't listen to the testimony of the witness and look at the paper.

The Court: Very well. We will delay it.

Mr. Shenker: It won't take me three minutes to do it, or two minutes.

The Court: We will wait. What is the time of the court and jury, three minutes I mean?

Government's Exhibits 9-A, 9-B and 9-C, is a statement signed by Sidney Goldstein and witnessed by Jack Fisher and myself on June 27, 1956. It is the result of the interview in the office of the FBI on the afternoon of June 27, 1956, which was dictated to a stenographer, typed and subsequently signed by Mr. Goldstein and witnessed by

Mr. Fisher and myself. It is the same three sheets of paper that I handed to Mr. Goldstein and he read.

[fol. 197] Mr. Boecker: Your Honor, I am going to offer Exhibits 9-A, 9-B, 9-C, for the limited purpose of identifying it as the paper prepared on the occasion described by this witness and by the previous witness, and for the further limited purpose of showing the circumstances that led to its preparation, but it is not offered as to the contents or with any effort to prove that the contents are fact.

Mr. Shenker: We will object to its introduction of the statement.

The Court: Overruled.

Mr. Shenker: For the reasons in line with what we have previously given, incompetent, irrelevant, immaterial, hearsay, and not binding or conclusive on the defendant.

(Government's Exhibits 9-A, 9-B, 9-C, received in evidence.)

At no time did the man who gave the statement indicate any unwillingness to make the statement or to sign the typed paper. During the time that I was with him, neither Mr. Fisher or myself or anyone else made any promises to him of what would result if he did or did not sign the paper. There were no threats made to him, and there were no threatening acts engaged in by any person there. To my knowledge, Mr. Goldstein did not indicate a desire to communicate with some person outside. If he did, his desire was granted.

Mr. Shenker: I move that all the statement be stricken, if the Court please, for the same reasons we have indicated before.

The Court: Overruled.

[fol. 198] Plaintiff's Exhibits 9a, 9b and 9c.

June 27, 1956,
St. Louis, Missouri.

I, Sidney Goldstein, make the following voluntary statement to Jack J. Fisher and Earl C. Porter, whom I know to be Special Agents of the Federal Bureau of Investigation. I reside at 10028 Driver, Overland, Missouri, and

am employed as Manager of the County Truck Parts and Sales Company, Inc., 2680 South Hanley Road, Maplewood, Missouri.

I have known Joseph Costello four or five years and I believe my wife, Artye, is a cousin of Joseph Costello. I have visited the Costellos in their home at 2626 Gurney Court, St. Louis, Missouri, on numerous occasions since that time.

At a time which I believe to be late afternoon or early evening on the Sunday following Costello's return from Florida, Artye and I and our son stopped by the Costello home to pay them a social call. When we got into the house, we found that Joseph and Barbara Costello were separating and counting the proceeds from their taxicab business and money and envelopes were laid out all over the dining room table. It was my understanding that this was money which had accumulated during Costello's absence in Florida. I was not told how much money was involved but I do recall that the following day Costello was arrested by the St. Louis Police Department [fol. 198a] and there was newspaper publicity to the effect that he had about $6,000 in his possession when arrested. I am certain that the date of the visit in question was the day immediately preceding the arrest, above mentioned. I have no specific recollection of leaving Costello's residence with Costello on the occasion of this particular visit.

I do recall that on one occasion *when I was visiting Costello's home** during the evening Costello and I went in my car to Domian's Standard Service Station, located at Conway Road and Lindbergh Boulevard in order to get a heavy-duty battery to fit a Cadillac and this battery was delivered by Joe and me to a man who had an old Cadillac car which was sitting facing west on Magnolia in the first block east of Gurney Court. This man was accompanied by a boy about 16 years old and I assume the boy to be his son. I do not know the names of these people. I am unable to definitely state that this trip to get the battery occurred on the Sunday when I observed Joe and his wife counting the money. We used my car in going to get the battery, although Joe had his Cadillac

* Emphasized words were written in longhand in the original exhibit and were not typed.

there at the time, because I was driving an old Cadillac and jokingly said, "Let's take a ride in a good car."

It is my belief that on the Sunday afternoon when we observed the Costellos counting money, Costello's Cadillac car was parked in front of his house. I can't remember [fol. 198b] any specific conversation about the Cadillac that date, but I am certain that during the time I was in the Costello home, no persons other than Mr. and Mrs. Costello, my wife and I and the children were present and there were no callers to the house. I have no specific recollection of the length of time that Artye and I stayed at the Costellos but I am certain that we did not have a meal in the Costello home on this particular occasion. Our visit at the Costello home on the Sunday preceding Costello's arrest by the St. Louis Police Department probably lasted about two hours; but longer if this was the same date we went to get the battery.

*I have read and corrected statement as altered it is true.**

Signed: SIDNEY GOLDSTEIN.

Witnessed:

JACK J. FISHER, FBI, St. Louis, Mo., 6-27-56.

Special Agent, FBI, St. Louis, Mo., 6-27-56.

EARL C. PORTER, Special Agent, F. B. I., St. Louis, Mo., 6-27-56.

Special Agent, FBI, St. Louis, Mo., 6-27-56.

[fol. 199] JACK J. FISHER testified as follows:

Direct Examination, by Mr. Boecker.

I am a Special Agent of the Federal Bureau of Investigation. My signature appears on Government Exhibit 9-C. I recall the circumstances leading up to my placing my signature on that piece of paper.

Q. Mr. Boecker: Will you relate them, please.

* * *

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* Emphasized words were written in longhand in the original exhibit and were not typed.

Mr. Shenker: Same objection, Your Honor.

[fol. 200] The Court: Your objection may run right straight through to all the testimony by this witness in connection with the matters gone into with the previous witness, that is Mr. Porter.

• • •

On the afternoon of the 27th of June I was instructed to interview Sid Goldstein. Earl Porter and I did that in our office. It is my recollection that Mr. Goldstein had been subpoenaed to give testimony before the grand jury on that date but because of press of time it was suggested by yourself (Mr. Boecker) that we interview this man and this we did in our office. Mr. Goldstein was willing to be interviewed.

The Court: Wait a minute. Did he say one way or the other?

The Witness: Yes, Your Honor. He said that he would agree to giving the story to us rather than to the grand jury.

The Court: Very well. Proceed.

Mr. Porter, Mr. Goldstein and myself were present during the entire interview. Mr. Goldstein was also present when a stenographer was called and the dictation was given.

We first talked to Mr. Goldstein and got his version of what he recalled and then a stenographer was called and in Mr. Goldstein's presence this statement was composed. To the best of my recollection, this statement relates what was related by Mr. Goldstein on that occasion. To the best of my recollection it does not relate anything contrary to what Mr. Goldstein told us on that occasion. I have not seen this statement since it was prepared until today. I have examined it and it is based on statements given to Mr. Porter and myself by Mr. Goldstein and based on my present examination of it and my recollection of the interview, there is no variance between what is in the paper and what Mr. Goldstein told us that day. During the time Mr. Goldstein was in the office there were no promises made to him relating to the signing of the statement. There were no threats made to him regarding the signing of the

statement and there were no threatening acts or conduct done in his presence regarding this statement.

Mr. Shenker: I will ask that the testimony be stricken, [fol. 201] the same as to Mr. Porter, Your Honor.

The Court: Overruled.

STANLEY A. WERONECKI testified as follows:

Direct Examination, by Mr. Boecker.

I am a deputy recorder. I have brought to Court pursuant to a subpoena a marriage license record in the custody of our office. Government's Exhibit 10-A is an application for marriage license, application no. 643580, and it is one of the records kept pursuant to statute in the office of the Recorder of Deeds of the City of St. Louis. It is the application and affidavit of Eugene Vernon Albert, Jr., and Miss Margaret Agnes Cannella. It has been produced here from the original records of the City of St. Louis Recorder's Office. Government's Exhibit 11-A is the marriage license of Eugene Vernon Albert, Jr., and Miss Margaret Agnes Cannella, and is one of the records kept in the Office of the Recorder of Deeds pursuant to the statutes of the state and it was produced here from the deposit of original records in our office.

Mr. Boecker: At this time I would like to offer Government's Exhibits 10-A and 11-A in evidence.

Mr. Shenker: I object to it on the ground it is totally incompetent, irrelevant and immaterial to points at issue in this case, does not tend to prove or disprove anything as far as defendant Costello is concerned.

* * *

The Court: Objection overruled.

Mr. London: In addition, defendant Cannella would like to add it is an effort on the part of the government to contradict the government's evidence in chief.

The Court: Overruled.

(Government's Exhibits 10-A and 11-A were received in evidence.)

Government's Exhibit 11-A bears the subscription of an [fol. 202] individual certifying that the marriage was performed. The date appearing as the date of the marriage of Miss Cannella and Mr. Albert is the 15th day of October, 1955. Government's Exhibit 10-B is a photostatic copy of the application for license, affidavit no. 643580. 10-B is a facsimile of 10-A made by a photographic process in our office. Everything appearing on the face of 10-A appearing on 10-B.

* * *

Government's Exhibit 11-B is a photographic facsimile of 11-A and everything appearing on the face of 11-A appears on 11-B in photographic form.

Mr. Boecker: I would like to ask leave at this time to withdraw the original 11-A so that it can be returned to the Recorder, and substitute 11-B.

The Court: You may have it; granted.

(Thereupon, the Government rested its case.)

[fol. 203] Motion of Defendant Joseph Costello for Judgment of Acquittal at the Close of Government's Case.

(Filed in U. S. District Court on April 15, 1957.)

Comes now defendant Joseph Costello at the close of the government's case and moves the Court to withdraw the case from the jury and to enter a judgment of acquittal in his favor on each count of the indictment, and for his grounds for this motion states that the evidence adduced is insufficient to sustain a conviction against him on any of the counts thereof.

Morris A. Shenker,
Attorney for Defendant
Joseph Costello.

This motion was by the Court overruled on the same date.

[fol. 204] Motion of Defendant Joseph Cannella For Judgment of Acquittal at the Close of Government's Case.

(Filed in U. S. District Court on April 15, 1957.)

Comes now defendant Joseph Cannella at the close of the government's case and moves the Court to withdraw the case from the jury and to enter a judgment of acquittal in his favor on each count of the indictment, and for his grounds for this motion states that the evidence adduced is insufficient to sustain a conviction against him on any of the counts thereof.

Norman London,
Attorney for Defendant
Joseph Cannella.

This motion was by the Court overruled on the same date.

[fol. 205] Motion of Defendant Joseph Costello at Close of the Plaintiff's Case to Require the Plaintiff to Elect Upon Which Count it Will Proceed.

(Filed in U. S. District Court on April 15, 1957.)

Comes now defendant Joseph Costello at the close of the plaintiff's case and moves the Court to require the plaintiff to make the following elections as to the counts under which it will proceed:

1. To elect whether it will proceed under Count One or Two of the indictment for the reason that under the evidence adduced it is apparent that the acts alleged to have been committed by this defendant under said Counts could constitute only one offense and that this defendant could be convicted only once under the said Counts of the indictment.

2. To elect whether it will proceed under Count One, Two, or Three of the indictment for the reason that under the evidence adduced it is apparent that the acts alleged

to have been committed by this defendant under said Counts could constitute only one offense and that this defendant could be convicted only once under the said Counts of the indictment.

3. To elect whether it will proceed under Count One, Two, Three, or Four for the reason that under the evidence adduced it is apparent that the acts alleged to have been committed by this defendant under said Counts could con-
[fol. 206] stitute only one offense and that this defendant could be convicted only once under the said Counts of the indictment.

Morris A. Shenker,
Attorney for Defendant
Joseph Costello.

This motion was overruled by the Court on the same date.

[fol. 207] Motion of Defendant Joseph Cannella at Close of the Plaintiff's Case to Require the Plaintiff to Elect Upon Which Count it Will Proceed.

(Filed in U. S. District Court on April 15, 1957.)

Comes now defendant Joseph Cannella at the close of the plaintiff's case and moves the Court to require the plaintiff to make the following elections as to the counts under which it will proceed:

1. To elect whether it will proceed under Count One or Two of the indictment for the reason that under the evidence adduced it is apparent that the acts alleged to have been committed by this defendant under said Counts could constitute only one offense and that this defendant could be convicted only once under the said Counts of the indictment.

2. To elect whether it will proceed under Count One, Two or Four of the indictment for the reason that under the evidence adduced it is apparent that the acts alleged to have been committed by this defendant under said Counts could constitute only one offense and that this de-

fendant could be convicted only once under the said Counts of the indictment.

Norman London,
Attorney for Defendant
Joseph Cannella.

This motion was overruled by the Court on the same date.

[fol. 208] Mr. Boecker: Your Honor, may I withdraw my announcement long enough to pass the exhibits to the jury before resting the case?

The Court: You may.

Mr. Shenker: Mr. Boecker, will you let the record affirmatively show what exhibits you are passing, please?

Mr. Boecker: I am doing so.

Exhibit 1. (Addressing the jury) You may look at it all you want.

Exhibit 1, a certified copy of the court record of the conviction of one George Costello, of burglary and larceny.

Exhibit 2, identified by witness Earl Lewis as a portion of his record reflecting particularly the sale of three guns to a person writing the name Joe Overbeck, top line of the sheet.

Exhibit 3, identified by witness Earl Lewis as a memorandum of a phone number which he called.

Exhibit 4, a revolver stated in evidence to have been obtained from Charles Klaich.

Exhibit 5, revolver obtained from James Price.

Exhibit 6, revolver found in the glove compartment of Cadillac automobile being driven by defendant Joseph Costello on February 27, 1956.

Exhibit 7, bullets taken from gun found in glove compartment of Costello's car.

Exhibits 8 and 9, are statements which I do not propose to circulate to the jury.

Exhibit 10-B, application for marriage license.

Exhibit 11-B, marriage license. In each case these are facsimiles, reflecting the marriage of Margaret Agnes Cannella on October 15, 1955.

I believe that is all.

Mr. Shenker: We are, of course, objecting to the introduction of any and all of those exhibits, if the Court please, for the various reasons we have previously assigned; furthermore, want to call the Court's attention to Exhibit 1, which is a record of conviction, that the exhibit shows a conviction for burglary and larceny, and we submit that the allegation in the record is only a con-[fol. 209] victim for burglary, and that exhibit is improper, and is only introduced for one purpose, and that is to unduly and unjustifiably bias and prejudice the minds of the jury, that it places defendant's character at issue prior to him having taken the stand and submitted himself to examination, and it is an improper comment on the defendant's character and reputation.

The Court: Overruled.

(The jury is looking at the exhibits.)

Mr. Boecker: The government now rests, Your Honor.

Mr. Shenker: May the record show the motions which we had previously filed, may they be refiled now?

The Court: Let the record show the motions previously filed by defendants Costello and Cannella, to dismiss and for the government to elect, are, with permission, refiled and submitted and all overruled.

Testimony for Defendants.

JOSEPH JOHN CANNELLA testified as follows:

Direct Examination, by Mr. London.

My name is Joseph John Cannella. I live at 11200 St. John, with my wife and one child. My other child is in the Navy. I am a cab driver and supervisor for the Ace Cab Company.

I have been in the Earl Lewis Gun Shop in Granite City, Illinois. I had been talking to someone at Bud Walsh's Used Car Lot about the fact that I needed a gun and someone gave me the telephone number of a man by the name of Harry and he said to contact him and he may be able to get a gun for me. Some time later I contacted this

party but he said that he dealt only in old guns and referred me to the Earl Lewis Gun Shop. I subsequently went to the Lewis shop and I have been there three times. I wanted a gun since someone had broken into the car at home and there had been prowlers around at night, and since I work different hours, my wife and son are by [fol. 210] themselves so I thought I would get a gun for their protection.

One day I was eating at Charlie Klaich's restaurant at Twenty-first and Clark, and we had been talking about the neighborhood and the breaking in and I said that I needed a gun for my home and that I had been looking for one, and he said that he needed one also and asked if I would try to get one for him. I said that I would. That is the same Mr. Klaich that testified here.

I went up to the Ace Cab Company garage into the big office and Mr. Price was demonstrating a duplicating machine and I watched him for awhile and I said, "Well, I am going to see if I can get ahold of a gun" and he stated that he wanted one and I told him that if I could get another one I would try to get one for him. I stayed for awhile and watched him demonstrating the duplicating machine and Mr. Costello came out and he said to one of the employees that he was going over to Illinois for awhile and I asked if he minded if I would ride along and he said that he didn't. I did not tell Mr. Costello why I was going to Illinois and to my knowledge he had no way of knowing.

We went over to Illinois and Mr. Costello stopped to see somebody I believe on State Street. When he was finished I asked if he would drive me over to Madison Avenue. When we got there I asked him to stop at the Earl Lewis Gun Shop. I went into the shop alone and while I was there I looked at some guns in a book and ordered some guns from Mr. Lewis. Mr. Costello came into the shop and said, "Joe, I am in a hurry. Let's get going, I have to get back" and I then left with him. Mr. Costello was driving a blue Cadillac on that day.

I contacted Mr. Klaich and Mr. Price and told them that I thought I was able to get each of them a gun and they asked if I wanted any money and I said I would wait until Lewis called and then I would contact them about the money. Lewis called and left the message at the

office so I called him and I said, "This is Cannella from the Ace Cab Company" and he told me that he had the guns. I went to Mr. Klaich and to Mr. Price and obtained the money for the guns and then went over to Lewis' shop, but when I got there and saw the guns I found that [fol. 211] they were the wrong ones and he said it would take a few more days to get the others and that he would call me when they came in. I then went back to work. On that day I had gone to the gun shop in an Ace Cab, the one that I drive. Mr. Klaich and Mr. Price had each given me $70.

When I returned to the office I asked Mr. Muth to put the money in an envelope and put it in the safe and he said that he would.

Sometime later, Lewis called back and left word for Joe, the supervisor, to call him and when I called he said that the guns were there. I stopped by the office and picked up the envelope with the money from Mr. Muth and then got in my cab and drove over to Lewis' shop, and when I got there I paid him for the guns.

Mr. Lewis referred to me by the name of Cannella. When I signed for the guns I used the name Joe Overbeck. He had told me to sign his book and also stated, "I don't care what name you put down". He said, "Just put any name down there because you are getting two for two other fellows". I was under the impression that it didn't make any difference to him what name was used so I put down the name, Joe Overbeck. Lewis knew that that was not my name, however.

I then came back to St. Louis and took one of the guns to Mr. Klaich and the other to Mr. Price.

The Court: Why didn't you put it under your own name?

The Witness: Sir?

The Court: Why didn't you put it under your own name?

The Witness: Well, Sir, he said to me, "It don't make any difference what name you put down." I just figured he didn't want me to put my right name down.

The Court: Why?

The Witness: I don't know, sir.

The Court: Proceed.

I took one of the guns to my home and put it in a closet in our bedroom where it stayed for two or three days until I took it down and cleaned the oil off of it. I went into the basement as I remembered a box of shells which [fol. 212] I went through. There were some of the boys' shotgun shells and some 22's and some longer bullets which I tried and they were 38's and I put them in the gun that I had. I then put the gun back on the shelf in the closet.

My wife told me that she was afraid that our little boy would get hold of the gun and she asked me to try to get rid of it, so I inquired of some of the driyers and Johnny Vichich said that he would like to take a look at it as he could use one around his house. I told him that I would bring it down the next day, which would be Saturday. On Saturday I brought the gun down but I did not see him that day so I left it in the cab, Saturday night, and on Sunday I went down and worked for a while but I didn't see him again and I then went to the Ace Cab lot.

I had two guns with me, the .38 that I have talked about and also a very small Derringer which is a very old gun and might be considered a collector's item.

I waited around the Ace Cab Company lot for awhile and when Mr. Costello came out of church I asked him if I could use his car and he said that I could. He gave me his keys and I drove his car over by my cab and took the guns out of my cab and put them in his car as I was going to take them home since I had not seen this fellow.

Mr. Costello's car was a black Cadillac. I took the guns and removed the paper as it had torn and I opened the glove compartment, put the guns in there and locked them up. They had been wrapped in a piece of newspaper. I then went home and had dinner and my wife and I and our baby took a ride out in the County, and I then went over to my mother's and sisters and left the baby there and my wife and I went across the river and stopped at a few places. After that I dropped my wife off at home and I took the Cadillac over to Mr. Costello's house and parked it in front of his house and put the one key on either the ash tray or the sun visor. I then walked over to Kingshighway and got a cab and went down to the Ace

Cab Company lot and picked up my cab and went home. I had forgotten the guns in the glove compartment.

[fol. 213] The next morning I went down to the lot and I believe I said to Mr. Costello, here is the glove compartment key. I forgot two guns there and he said, I know, they stopped me and found them there. I had never told Mr. Costello prior to that morning that the guns were in the glove compartment.

Mr. Costello did not give me any of the money or any part of the money with which I purchased the guns. I was not buying these guns for Mr. Costello nor was I buying them at his suggestion or request. To the best of my knowledge, he did not even know that I was buying the guns, nor did he know what I did with the guns after I got them. I had no discussion with him about these guns.

I recall having a conversation with some agents of the Federal Bureau of Investigation but I do not recall the exact date. If I told them anything different than what I have testified to today, it is because that morning I got sick and I wound up in Faith Hospital for I think three or four days and if I told them anything other than what I have said here, it is not true. I went to Faith Hospital the same day that I talked to the FBI men.

I testified before the grand jury after being sworn. I told the grand jury that Mr. Costello had nothing to do with the purchase of these guns in any way, shape or form. I told them that Mr. Costello knew nothing about these guns. I told the grand jury that Mr. Klaich and Mr. Price had purchased one of the guns, and I also told them about leaving one of the guns along with the Derringer in Mr. Costello's glove compartment.

On the first day that I was at Faith Hospital I had some visitors. My wife was there with me, and that evening Mr. Costello came to see me. Mr. Costello learned I was in the hospital since I had told my wife to call him and tell him and ask him to come over.

I knew that Mr. Costello had been in jail but I did not know for what. I did not know what, if anything, he had [fol. 214] been convicted of and I did not know what class of crime he had committed, if any. I had no knowledge of any sort as to the reason for his being in jail.

I am still working at the Ace Cab Company and have been working there continuously over the last six months,

or year, or two years and during this Court's recess last Friday, Saturday and Sunday, I worked at the Ace Cab Company. I am not afraid of Joe Costello for any reason. He is my friend.

[fol. 215] Cross-Examination, by Mr. Shenker.

The Derringer that I left in Mr. Costello's glove compartment has never been returned to me. Either the police or the FBI still have it. When I returned Mr. Costello's Cadillac to him on that Sunday evening, I still had the key to the glove compartment in my watch pocket.

I never consulted with Mr. Costello about whether I should buy the guns or whether I should sell them. I made a profit on the sale of the guns and I gave none of this money to Mr. Costello.

I had Mr. Costello called from the hospital so that he could get somebody to move my car from the lot, Eleventh and Market. He then came over to the hospital to see me.

Defendant's Exhibit B is something that I had made for Mr. Costello three or four years ago. It is a gold golf tee on a little stand.

Q. Mr. Shenker: What is that inscription; will you read the inscription?

Mr. Boecker: I will object to any reference to it.

The Court: Sustained.

I gave it to him as a token of friendship.

Mr. Boecker: I will object to any further questioning until the thing has been offered in evidence and received.

Mr. Shenker: Oh, I am sorry.

The Court: Objection sustained.

Mr. Shenker: I am offering it.

Mr. Boecker: It is objected to, self-serving and outside the issues in the case.

The Court: Sustained.

Mr. Shenker: I would like to make an offer of proof.

(There was a side bar conference between the Court and counsel out of the hearing of the jury in which the following occurred:)

Mr. Shenker: The inscription on Defendant's Exhibit B reads—the inscription on this exhibit shows, "To my best friend, Joe Costello from Joe Cannella". And the purpose of this being offered is because there is some testimony which has been injected here that this witness might be under duress, and it is offered for the purpose of showing [fol. 216] that Mr. Cannella is a real, close friend, and a good friend of Mr. Costello, and that this is a circumstance to show that he would have no reason to be fearful of him.

Mr. Boecker: I submit it is too remote in time. He said he gave it several years ago. Furthermore, it is self-serving.

The Court: Objection sustained. Offer denied.

(The trial was then resumed before the jury, and the following occurred:)

I had borrowed cars, either owned or operated by Mr. Costello, many, many times before the time I borrowed his Cadillac on the Sunday in question. I also borrowed a Cadillac from him sometimes around October of 1955 when a niece of mine was married.

The car that I borrowed on the date in question was owned by Mrs. Costello. I have seen her drive it and I believe Mr. Costello owned an Oldsmobile at the time.

Cross-Examination, by Mr. Boecker.

I have never been convicted of a felony. I was not convicted of selling liquor without a license in St. Charles County in 1945. I never went to Court on that. I do not know that there is a judgment on file in the State of Missouri versus Joseph John Cannella showing that I am guilty of the crime of selling intoxicating liquor without a license.

Q. Mr. Boecker: Mr. Cannella, several times during your testimony you refer to your wife; you said that she was with you in the car and that she protested about the gun. Now, in each case I would like to have you tell me whether the lady that you intended for us to understand is your wife is Mrs. Effie Cannella, who lives with you at 11200 St. John, or whether it is Mrs. Juanita Cannella, who lives with you at 10314 Eaglewood Court, to which of them do you refer?

Mr. London: I object to this, Your Honor. It is completely improper on the part of Mr. Boecker, placing the defendant's character in issue. Mr. Boecker knows it is an improper question. I ask that he be reprimanded, the jury [fol. 217] instructed to disregard it, and a mistrial be declared at this time.

The Court: The Court will sustain the objection.

Mr. London: I am objecting to that, of course.

The Court: The objection will be sustained to the present question, the question in its present form. What else?

Mr. London: I am asking that Mr. Boecker be admonished for asking questions which he knows are improper; the jury be instructed to disregard any inference which they may draw from Mr. Boecker's question, and a mistrial be declared at this time.

The Court: The jury will be instructed to disregard any inference it may draw at this time. What are your other motions?

Mr. London: I am asking for a mistrial.

The Court: Overruled.

Mr. London: I am asking that Mr. Boecker be admonished for asking questions which he knows are improper.

The Court: Overruled.

Mr. Shenker: Defendant Costello, of course, if the Court please, in view of the question, moves for a mistrial as to him.

The Court: That is overruled.

Mr. Shenker: And a severance.
Thank you, Your Honor.

One of the guns that I got from Earl Lewis was placed on the shelf in the closet at 4713 Hatz. I live there with my wife and my baby. My wife's name is Effie. The baby's name is Gary and he is actually eleven years old now. He was ten at the time. My son who is now in the Navy was also a member of the household at that time.

The box of shells which was in the basement was hidden over in a corner among a bunch of other stuff because I

did not want the little one to get into it. My other son would get shotgun shells only if I gave them to him. On many occasions I have used a car borrowed from Mr. Costello and on many occasions it was a Cadillac which had been driven by Mr. Costello. I cannot recall ever having seen him operate the glove compartment.

When we drove over to the Lewis Gun Shop the time Mr. Costello was with me, he was driving a blue Cadillac. I was never in Granite City in that blue Cadillac with him [fol. 218] on any other occasion. He never came into the Earl Lewis Gun Shop and talked about guns.

When I got the guns I signed the name, Joe Overbeck. Since Mr. Lewis had told me to just put down any name as it didn't make any difference, I assumed that he didn't want me to put down my right name.

Q. Mr. Boecker: Why would you assume that?

A. I don't know, sir.

Q. Didn't you always do business under your right name? A. Yes, sir.

The Court: Had you ever used that name, Joe Overbeck, on any other occasion?

The Witness: No, sir.

Q. Mr. Boecker: Isn't it a fact that after the FBI started to investigate that you went and talked to Joe Costello about it, you said, "Joe, I am going to get in trouble over those guns".

A. Not that I recall, sir, no, sir.

Q. Do you say that you never said that?

A. Not that I can remember, no, sir.

The Court: Well, stop and think hard.

The Witness: No, sir.

I can barely remember getting to the FBI office as that was when I got sick. I don't know what the nature of my symptoms were.

I do not have mental lapses and I have never complained of mental lapses. On this occasion I do not know of being treated for any mental trouble. As I recall, at the hospital they gave me some pills. I do not recall having any pain. I do not know the occasion for my going to the hospital

and I don't know how I left there or why I went there. I don't remember being sick, I just wound up in the hospital. I can recall the first evening in the hospital and as I recall, I had no pain and I can recall no pain up until the time that I left the hospital. I don't know why I was in the hospital. I was sent there and I do not know what the doctor was treating me for. I don't think it was any mental trouble. I do not remember how I left the Federal Building or how I got to the hospital or anything else. [fol. 219] I don't remember if I ate the first evening in the hospital or not.

I don't recall anything that I said in the FBI offices when I was there. I don't recall if I told them that Joe Costello bought those guns or not, and I don't remember whether I told them that Costello gave the money for the guns or not. The last thing that I can remember is just barely getting into the Federal Building accompanied by some FBI agents.

I would say that I had the Derringer for three or four years or more. I have never fired it and I don't know how to open it. I didn't know anything about it. I didn't know how it was shot. I wouldn't know how to fire this one and load it; otherwise with the other because I didn't know anything about it. I would say that the reason I bought a new gun because I didn't know how to fire the old one.

If I needed protection I could have protected myself with the Derringer if I had known how to use it. I don't remember where the box of ammunition in the basement originally came from, whether it was moved from the house we lived in on Lotus or whether it was in the house when we rented it. The ammunition had been around there for a couple or three or four years. I did not test it [fol. 220] to see if it was still good ammunition. Nobody told me that old ammunition was dangerous.

I happened to select this type of gun as I had seen them before in magazines and sport books. This gun is a Chief manufactured by Smith and Wesson and is .38 caliber.

The Court: Just a minute. Find out why it was that he got that particular type, if he knew about this ammunition when he bought the gun.

* * *

Q. Mr. Boecker: Did you have in mind when you bought this gun you already had some ammunition you could use for it? A. No, sir.

Q. That was just a happenstance?

The Court: Circumstance, is that what you mean?

A. I don't understand that.

Q. Mr. Boecker: The fact that you had some ammunition occurred to you later, is that right? A. Yes, sir.

I did not buy any ammunition for the use of this gun. [fol. 221] I do not recall ever stating to Mr. Klaich that I heard that he was in the market for a gun. Nobody told me that he was in the market for a gun until I talked to him. Mr. Costello had not told me that he wanted a gun.

I have been driving cabs around St. Louis for eight or nine years and I know the city and places of interest and the businesses fairly well. I do not know that there are gun shops here in St. Louis that sell guns openly.

Q. Mr. Boecker: Don't you know there is one not more than three blocks from the courthouse here, Goodman's Guns?

A. I know there is a gun store, yes, sir.

Q. You never went there to try to buy a gun?

A. Not that I can recall, no.

The Court: Stop and recall right hard.

The Witness: Sir?

The Court: Stop and think right hard, and then give us a definite answer.

The Witness: I believe I was in there, yes, sir, I was.

The Court: When?

The Witness: It has been some time ago, sir.

The Court: How long before the time that you went over to Granite City?

The Witness: Oh, I would say maybe a couple months.

The Court: And did you make an inquiry there?

The Witness: Yes, and they said you had to have a permit, you know, to buy one.

I didn't get a permit because I didn't know how to go about it. I did not go over to Illinois rather Missouri to get the gun so that I could use a false name.

I am not acquainted with Gresham's place of business and I have never been there and have never gotten a gun there, and I do not know if Mr. Costello has ever gotten a gun there.

I had the guns with me because I wanted to show them to an individual by the name of Johnny. Previously when asked by you (Mr. Boecker) and by others to identify this Johnny, I never said anything but that his name was [fol. 222] Johnny. I looked at the pictures of all of the people on file as a necessary part of the licensing in the city and I could not pick out Johnny. I know who he is now because I have seen him here in court and have seen him before.

Q. Mr. Boecker: Is he here in court today?

A. No, sir, I don't see him.

The Court: Stand up so you can get a good look.

Mr. Boecker: He said he didn't see him.

The Court: I thought maybe if he got a good look.

The Witness: No, sir, I don't see him.

I saw him out in the hall today and also on last Thursday. The last time I saw him before that was on a Biederman furniture truck a couple or three months ago. I did not talk to him at that time and I do not recall when the last time was that I saw him before that.

Q. Did you report to anybody that you had seen him driving a Biederman furniture truck? A. No, sir.

Q. You knew the FBI was interested in trying to learn the identity of the man you called Johnny, didn't you? You knew the FBI was interested?

A. I guess so, yes, sir.

Q. Did you tell the FBI you had located Johnny?

A. No, sir.

Mr. London: I object to the line of questioning as improper and immaterial.

Mr. Boecker: I submit it is proper cross-examination.

The Court: Overruled.

Mr. Shenker: May we object to it for the further reason, if the Court please, that this man was under indictment some week or probably within ten days after he gave his statement to the FBI and certainly there was no duty on his part to tell them who his witnesses were.

The Court: Objection sustained.

When I was trying to identify Johnny by looking at photographs I spent about three hours. They were the photographs of the men holding licenses to drive cabs in [fol. 223] St. Louis. Johnny had been working extra as a cab driver and also worked the switchboard upstairs. I have seen him driving an Ace cab and have also seen him in the cab rack at various hotels. I never saw his picture in the license department.

I have never made any effort to sell these guns to anybody else. I have not gotten in touch with Johnny or tried to get in touch with him since I have looked at the pictures.

Mr. Boecker: I would like to make a record outside the hearing of the jury.

(There was a side bar conference between the Court and counsel out of the hearing of the jury, during which the following occurred:)

Mr. Boecker: In support of a question regarding the identity of the woman referred to as his wife as to which of two people it was, I would like to have the record show that evidence available to me would show, and this witness if he gave truthful answers to questions, would also show that he does maintain two households, or does maintain two houses, and there have been two women known as Mrs. Joseph John Cannella, and therefore it was a proper question to ask as to the identity of the person he referred to as his wife. I would like to make an offer of proof if the question were asked of this witness if there were in fact two Mrs. Cannellas, two households, he would answer yes, and if he answered no, by independent evidence we could show that there were two households and two Mrs. Cannellas.

Mr. Shenker: We certainly object to that offer of proof. All that could possibly serve would be to impeach or re-

fleet on his moral character, have no bearing on the issues in this case. He said what address he lived and where he lived with his wife and children. I do not see where that could have any significance except putting his wife at issue, a collateral matter.

Mr. London: I wish to join in that objection.

The Court: Offer denied. Objection sustained.

(The trial was then resumed before the jury and the following occurred:)

On the day that I used the Cadillac I left my son at my [fol. 224] mother's and I picked him up on the next day. I believe that he missed part of school the following Monday. I can't recall if I got him before or after dinner from my mother's and I can't recall whether I took him to school. I don't believe that I picked him up in the morning and took him to school.

JOSEPH G. COSTELLO testified as follows:

Direct Examination, by Mr. Shenker.

My name is Joseph George Costello. I live at 2626 Gurney Court in the city of St. Louis. I am married and at the above address I live with my wife and children. I have six children.

I was convicted of a felony over twenty-one years ago in St. Francois County. It was burglary second degree and larceny and it was in 1936.

I know a Mr. Arnold. It was a Mr. Arnold who contacted me one time with reference to a Plymouth automobile but it was so long that I cannot tell exactly whether it was the same gentleman that testified here or now. However, it resembled him. I did not contact Harry Arnold in the latter part of 1954 or any time in 1955 with reference to a .38 model Terrier Smith & Wesson revolver, nor did I inquire of him where I could obtain such a gun.

I know Mr. Joseph Cannella. He drives a cab and is a supervisor for Ace Cab Company and has been engaged in that capacity since 1954.

In December, 1955 my wife owned a Cadillac automobile and we also had an Oldsmobile which was owned by

the company that I am president of. The title to the Oldsmobile was in the name of Ace Service Company.

In December, 1955 I had occasion to go to Granite City, Illinois, and I recall the incident when Mr. Cannella went with me. I went over to see a Mr. Ray Lewis who owns the Yellow Cab Company and the Black and White Cab Company over there with reference to signboards and placards which are placed on the rear end of cabs. We were to talk about getting these signboards on the back of his cabs so that then in selling advertising I could sell more than the hundred or hundred and twenty-five that [fol. 225] I had and could have some put on the back of his cabs and he would be paid for that portion.

Mr. Lewis drinks a little bit and when he does he forgets his appointments and when I got over there he was not there. When I left my office I told them where I would be so they could reach me if necessary, and Mr. Cannella heard me say that I was going over there and asked if he could ride along and I told him it would be all right.

I went in to see Mr. Lewis but he was not there and one of his drivers said that Ray wouldn't be there that day and when he kind of smiled I knew what he meant so I left and got into the car and asked Cannella where he wanted to go. He said he wanted to go over on Madison Avenue so I drove over in that direction and we were looking for an address that he had on a slip of paper. At a certain point, Cannella said, "This must be it" and so I stopped and he said that he wouldn't be long and I said that I would appreciate it because I would like to get back. After he was in there about ten minutes I was getting a little impatient and I blew the horn and when he did not respond, I went up to the door and said, "Joe, if you don't mind I would like to get going", and he said that he would be with me in a minute. I then returned to the car and in a couple of minutes he came out and got in the car and we went back to St. Louis.

When I went to the Yellow Cab and Black and White Cab office to see Mr. Lewis, Mr. Cannella sat in the car.

Mr. Cannella did not tell me the purpose of his trip to Granite City and I did not ask him. I did not participate in any of the conversations in the Earl Lewis Gun Shop and did not say anything pertaining to what he was doing there. When he came out, he didn't tell me what he had

been doing there and I didn't ask him. When we came back to St. Louis we went back to my place of business.

On February 27, 1956, at approximately 7:15 in the morning I was arrested by the police department of the City of St. Louis. At the time I was coming from home and going to work. As I pulled out of the court where I live I noticed a green car parked and I thought it was strange [fol. 226] that a car would be parked on a cross-walk as it was a private street, and as I pulled out I noticed in my mirror that this car pulled out of the court also and when I got up to Tower Grove and Blaine Avenue, two fellows pulled alongside of me and pulled me over to the side. They were police officers. I recognized Officer Boni as he used to work for the Ace Cab Company. I was then [fol. 227] taken to the station and my automobile was left in the police garage. When I pulled into the garage there was only one key in the automobile and that was the key to the ignition. I had no other keys to that particular car. I did have door keys and keys for the Oldsmobile and they were taken from me at the booking desk in the Central District Police Station.

When I was stopped by the officers on Blaine Avenue I was searched and they knew that I had keys in my pocket. I did not have the proper key for the glove compartment in my possession but the police claimed that one of the keys in my possession fit it. Cannella had the key to the glove compartment and I told the police that I did not have it.

While I was in the police station for some period, the police officer showed me a gun like Government's Exhibit 6. It was shown to me in Captain Doherty's office. I had never seen this gun before. They also showed me a Derringer gun and Captain Doherty asked me how to open it. I had never seen one before.

On the morning that I was arrested, February 27, 1956, I did not know whether there was a gun in the glove compartment of my wife's automobile. The car had been used on the Sunday before, that would be February 26, 1956, by Joseph Cannella.

On Sunday morning I always go to the garage and attend eleven o'clock Mass at St. Nicholas and when I came out he was waiting and he asked if I was going to use the car today and I said that I wasn't as I had a lot

of work piled up since I had been away for a month. My baby had had an eye operation and the doctor suggested a warm climate would be better for her so we went down south for a month, and while I was gone all of these envelopes had piled up. They were brought in on the different cabs day by day, the ones that I take care of myself, and I knew that I had a good eight or nine hours work in front of me when I got home to open them and count the money because I could not do it at the office. There were too many interruptions so I usually take those envelopes home when they pile up and my wife and I can do them without being bothered. Since I knew that I [fol. 228] had work to do and it is not unusual for me to loan my car to other people, I told Joe that he could use it and I gave him the keys. I would say that that was right around noon. I next saw the car the next morning when I came out to go to work. I did not have the car anymore that Sunday afternoon or evening. I have let many persons in the office use the car.

I did not sell any gun to Mr. Klaich nor did I arrange for the sale of any gun to Mr. Klaich. I did not sell any gun to Mr. Price nor arrange for the sale of a gun to Mr. Price. I never told Mr. Cannella that either Mr. Klaich or Mr. Price wanted to buy a gun. I have never purchased a gun from the Earl Lewis Gun Shop nor have I ever purchased Government's Exhibits 4, 5 and 6 and I did not have anyone else purchase them for me, or any one of them. I did not own any of those guns or have any financial interest in any of them. I never saw any of those guns until after I was arrested. I have never seen the bullets which comprise Government's Exhibit 7. They do not belong to me and I have no interest in them.

At the time of my arrest I did not know that any of the keys that I might have in my possession could possibly fit the glove compartment of the car that I was driving. Prior to my arrest on the 27th of February I did not know that there were any guns in the glove compartment of my wife's automobile. I did not know about them until the police officers showed them to me in Captain Doherty's office and told me that they came from the car.

Q. I will ask you to state if on or about the 22nd day of December, 1955, you did ship or transport or cause to be shipped or transported, a Smith & Wesson .38 caliber

Chief Special revolver with serial number 68897 from Granite City, Illinois to St. Louis, Missouri.

A. I did not.

Q. I will ask you, sir, if on or about December 22, 1955, you did ship or transport or cause to be shipped or transported, a Smith & Wesson .38 caliber Chief Special revolver, serial number 65965, from Granite City, Illinois to St. Louis, Missouri. A. I did not.

[fol. 229] Q. I will ask you, sir, to please state if on or about December 22, 1955, you did, at St. Louis, Missouri, receive a Smith & Wesson .38 caliber Chief Special revolver, serial number 68897.

A. No, sir, I did not.

Q. I will ask you to state, sir, if at any time beginning on or about June 1, 1955 up to the date of the indictment in this case, you did conspire or agree with Joseph Cannella to transport, ship, receive, or cause to be transported, or shipped from Granite City, Illinois to St. Louis, Missouri, any Smith & Wesson .38 caliber Chief Special revolvers.

A. No, sir, I did not.

I did not know Earl Lewis at any time. I believe the first time I ever saw him to recognize who he was, was here in the hall during this trial. I presumed that he was the man in the shop when I saw Mr. Cannella in there that one time.

My wife is in the hospital. She was taken there at one o'clock the other morning.

Cross-Examination, by Mr. London.

I had no dealings or arrangements or conversations or anything like that with Mr. Cannella with respect to these guns which have been brought into this Court room or any other guns.

Cross-Examination, by Mr. Boecker.

My full name is Joseph George Costello but I am commonly known by the name of Joseph, without the George.

Q. Mr. Boecker: But back when you were committing burglary you went by George, without the Joseph?

A. I don't know what you mean back when I was committing burglary, Mr. Boecker. I never pled guilty to a charge of——

Q. You were found guilty by the jury on the evidence.

A. Yes, sir, I was convicted by a jury.

Q. On the evidence? A. Yes, that is correct.

Q. Beyond a reasonable doubt.

A. Well, I don't know that it was.

[fol. 230] Q. The judge told them they had to find out beyond a reasonable doubt.

A. I don't know if he did or not.

Q. I am sure he did.

A. I am sure he did, too, but I don't know.

Q. At that time you went by the name George Costello, didn't you? A. Yes, sir.

Q. And you had been hoping people won't find out that that George is the same as you, Joseph, isn't that right?

A. I was ashamed of having done time, yes, I was ashamed of it. That was twenty-one years ago.

I believe in my testimony in response to Mr. Shenker's questions, I referred to the Cadillac several times as my car. Anything that belongs to my wife belongs to me, it is joint property. I have driven it many times and I know what the keys are for. One key operates the ignition and doors and the other key operates the trunk and glove compartments. On the day of my arrest the only key that I had with me was the key for the ignition. I did not ask the police how they opened the glove compartment as I thought they had broke it open. I don't know how they opened it. To my knowledge Cannella was not around while I was in the holdover. He was not brought in with me that morning.

When they told me that they had found guns in the glove compartment I laughed. I was surprised and I could not figure out how they got there.

Q. Mr. Boecker: Well, you are used to carrying and using guns, aren't you?

A. I would not say that. What do you mean by that?

Q. Let me call your attention to your own lawyer's statement to the jury opening this case. He said he would show by the evidence you only had two guns, one which you kept at your home and one in your office.

A. That is correct.

Q. That is true; where did you get those guns?

A. Well——

[fol. 231] The Court: Answer.

A. Well, the gun that I have at home about, oh, I imagine it was over five years ago, it was just about five years ago it was brought in to me by a cab driver. He had hauled a fare and the fare could not pay him and he took it and I think if I am not mistaken he gave him ten dollars for it.

That, if I am not mistaken, was a Colt .38 caliber.

The gun at my office was left in my partner's desk when he died in December 1950. Mr. James was my partner and he was president of the company and when he died I took his desk. The gun was in the desk and it has been there ever since. I kept it a whole lot as a sentimental value more than anything. I suppose I would use it to protect my life but I always instructed my people in the office in case of a holdup not to resist, to just give them the money because I do not think I would shoot a man for money, but if my life was in danger I believe I would use it.

I believe that was the gun that Mr. Klaich saw in the desk drawer and he said something like he would like to get one. I did not say they are hard to get. I asked him if he had a permit for a gun. I do not have a permit for a gun but I was not trying to buy one. I did say, if you don't have a permit they are hard to get. I did not then inform Cannella that the man was interested in guns. I did not tell Cannella that James Price was interested in a gun and I did not know that he was interested.

I was not in the Earl Lewis Gun Shop talking about guns. I was only in there once and that was to tell Cannella that I wanted to get back. I don't recall ever saying that I preferred the Chief model to the Terrier of this manufacturer. I don't know if I prefer the Chief model to the Terrier as I have never seen the Terrier.

Q. Mr. Boecker: What kind of gun was it you shot yourself with? A. I shot myself with?

Q. Yes.

[fol. 232] Mr. Shenker: I object to that. That is certainly incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Shenker: I ask at this time counsel be reprimanded at this time, and a mistrial declared.

The Court: The jury will disregard the remark. The motion for a mistrial is overruled.

[fol. 233] To my knowledge I did not have a gun in the car that I was in at the time of my arrest in this case. I was told that at the time of my arrest in this case which is April 10, 1956, that there was a Smith & Wesson .38 caliber in the trunk of the Cadillac convertible but it was not there with my knowledge. Mr. James, who works for me, also has a convertible and both convertibles, his and mine, have black leather bags for the tops. Both cars were on the rack being washed and one of the colored boys in confusion threw his bag into my trunk and my bag into his trunk and I would have never known it until he discovered later that he did not have the right top to his car.

I know what keys operate what on the Cadillac. At the time of my arrest I did not tell the police that I did not know which key would operate the glove compartment. I told them that I did not have the key to the glove compartment. I do not recall telling them it was my wife's car.

The gun that I have at home is a gun that was turned over to me by one of the drivers. It is a Colt .38 caliber.

Q. Now, isn't it a fact that you also had another gun on your premises the first part of 1956?

Mr. Shenker: We are going to object to that, if the Court please, certainly incompetent, irrelevant and immaterial.

Mr. Boecker: Cross-examination on the issue as framed by the defendants, Your Honor.

The Court: Overruled.

A. I don't understand your question, Mr. Boecker.

Q. Mr. Boecker: At the time you had that Colt gun at [fol. 234] home, and limiting it to the early months of

1956, didn't you also have another gun on your premises at home? A. Yes, sir.

Q. What was that? A. A shotgun.

Q. Didn't you also have another side arm, revolver?

A. I had a shotgun. I have got this gun I got from the driver. I want to be sure of this. What part of '56, Mr. Boecker?

Q. Well, on the occasion when you were arrested and immediately prior thereto; you were arrested on April 10, 1956? A. Yes.

Q. Now, I am referring to the gun which you described in evidence as one that was accidentally put in your car because of an attendant's, you say mixed it up with some property of some other person.

A. Do you mean did I have that gun in my home in 1956? The answer is no, sir.

Q. Did you ever have that gun in your home?

A. The answer is no, sir, if that is the gun you are referring to.

Q. Now, at the time that you had the gun in your home that you described as being a Colt, and referring to the occasion in October, 1954, when there was a report that you had been accidentally shot while cleaning the gun, was that the same Colt?

Mr. Shenker: Just a minute. I am going to object to any conversation of any gun pertaining to an alleged time when Mr. Costello shot himself, or Mr. Boecker indicated, on the ground that it is totally incompetent, irrelevant and immaterial, goes beyond the scope of the direct examination, and I believe Your Honor has ruled on it yesterday.

The Court: I did yesterday.

* * *

Mr. Boecker: I submit I propose to connect it up with additional questioning about an additional gun, that is the purpose of my examination.

Mr. Shenker: I don't see where that would have any- [fol. 235] thing to do with it.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

The Court: It seems to me, Mr. Boecker, that your question is beyond the scope of the direct examination, and I can't see any occasion for going into that at this time.

Mr. Boecker: May I state for the record my theory as to the purpose, and that is in the opening statement of Mr. Costello's counsel he pointed out that he would prove in evidence he only had two guns, one that he kept at home and one that he kept at his office, and since he attempts to meet the issue in that way I have a right to show at a time not too remote, which is a matter of only about sixteen months prior to his arrest here, I have a right to inquire about whether or not he did not in fact have additional guns of the same character as those which we are discussing, that is revolver, side arms, .38 caliber. I submit the only question would be whether it is too remote in time. I submit it is not. It is a matter of sixteen months in time.

Mr. Shenker: Of course, this is obviously not proper. I can make any opening statement and limit the defendant to whatever purpose I want to limit it. I say the opening statement of counsel does not mean the defendant has to testify to everything that is made in the opening statement of counsel. In other words, I can make an opening statement and not even put the defendant on the stand. He testified what he had and what his position was at the time he was arrested.

The Court: He testified to what, Mr. Boecker?

Mr. Boecker: I submit he testified on that point saying that he only had two guns at any time. He said one gun "I had at home and I got that from a driver", sometime in the past, and one, "I had at the office. I got that from my deceased partner" at sometime in the past. I say he has carried the history further back than I inquired about. I only went back to '54. He has indicated he went back further than that.

The Court: The partner died, James?

Mr. Shenker: James, his partner.

The Court: I did not recall that; he testified a gun James [fol. 236] had, but he never mentioned the time. At this

time I think I will sustain the ob[illegible]n without prejudice.

Mr. Boecker: May I proceed with questions to lay—which I believe will lay a foundation?

The Court: Yes, I have no objection to doing that.

(The trial was then resumed before the jury during which the following occurred:)

Q. Mr. Boecker: Let me put a different question to you, Mr. Costello. The Colt gun that you are talking about, you said was turned over to you by one of your drivers?

A. Yes, sir. That is right. It has been around five years ago.

Q. And you had had that gun in the house for about five years, and you say that is the only side arm you had in your house for those five years? A. I did not say that.

Mr. Shenker: Just a minute. I object to that, if the Court please. That goes beyond the scope of the direct examination, totally incompetent, irrelevant and immaterial. If Mr. Boecker was to contend that he has any other charge pending against him beside the charge for which he is now being tried, then there might conceivably be some reason for going into it, but there is not any charge. Mr. Boecker conceded there isn't any.

Mr. Boecker: I submit it is proper impeachment of the defendant.

The Court: Objection overruled.

* * *

A. I did not make that statement. I did not say that was [fol. 237] the only one.

Q. Mr. Boecker: I am asking you, is it the only side arm that was in your house during those five years?

A. That I can recall, yes, sir.

Q. Now, isn't it a fact that on this occasion in October, 1954, you had on your premises another Smith & Wesson .38 caliber revolver? A. If I did I didn't see it.

Q. Do you say that there was no Smith & Wesson on your premises October 29, 1954?

A. I said I did not see it if there was.

Q. Could you offer any reasonable explanation as to how a gun would be on your premises without you having seen it?

A. They said they found one in the basement some place.

Q. They did say? A. Yes.

Q. Who is "they"? A. The police.

Q. They said they found a Smith & Wesson .38?

A. They said they found a Smith & Wesson in the basement under the porch.

Q. You did not know how it was there?

A. How could I know it was there. They told me about it.

The Court: Don't argue with counsel.

The Witness: I am sorry.

Mr. Shenker: I ask that this question be stricken, incompetent, irrelevant.

The Court: Overruled.

Mr. London: I object to it, and ask that the jury be instructed to disregard any line of questioning as applying to the defendant Cannella.

The Court: Overruled.

Q. Mr. Boecker: Do you say that you never have seen the gun since then?

The Court: The Court will rule on the objections, and any other objections along that line, the Court will rule.

Q. Mr. Boecker: May I ask if you have ever seen the gun [fol. 238] which the police say they found in the basement?

A. If I ever seen it?

Q. Yes. A. No, sir.

Q. All you know is that they said they found a Smith & Wesson, is that correct? A. That is correct.

Q. Now, what does your household consist of that lives at that residence there?

A. What do you mean household, furniture?

Q. No, who are the members of the household, who are the people?

A. Well, my wife and my children and myself.

Q. The children are little children, aren't they? A. Yes.

Q. They would not have the revolver? A. No.

Q. Do you think your wife would have had the revolver?
A. I doubt it.
Q. So that the story is that if there was that gun there it is entirely unexplained by you? A. If it was there.
Q. If it was there? A. If it was there.
Q. Do you deny it was?
A. I deny knowing it was there, so I must be denying it was there.
Q. I will ask you for a straight answer: do you deny a Smith & Wesson .38 was in your basement on October 29, 1954?

Mr. Shenker: I object to that on the ground this is repetition. The witness has answered it.

The Court: The witness answered it to this extent, that if it was there he did not see it.

Mr. Shenker: That is right. The witness has said he had never seen it.

The Court: He said he had never seen it. Is that a com-
[fol. 239] plete answer or not? Did you ever know about it being there?

The Witness: No, sir, Your Honor.

Q. Mr. Boecker: I asked this further question: do you deny that a Smith & Wesson .38 was in your basement on the occasion when the police said they found it?

Mr. Shenker: If the Court please, here is a witness who testifies the police said there was something under the porch at the place. He said he did not see it; he never put it there, did not know of it being there. Now, why should he say he denies that it was there when he does not know, and he so answered it. We submit, if the Court please, that that is certainly an improper question.

The Court: I think perhaps Mr. Boecker has exhausted the subject. I believe he has asked—I will let him answer one time more. Answer this last question.

Mr. Boecker: That is the final question on that subject, Your Honor.

Mr. Shenker: But my objection, Your Honor——

The Court: Your objection is overruled.

Mr. Shenker: May I point out to the Court he wants him to deny that it was there.

Mr. Boecker: I will object to Mr. Shenker——

The Court: Don't instruct the witness how to answer.

Mr. Boecker: Yes, that is my objection. He is suggesting an answer.

The Court: You made an objection. The Court has ruled against you.

Mr. Shenker: Very well.

The Court: Sit down.
Read the question.

(The question read.)

Mr. Boecker: I wish to add a word there, "They found it there".

The Court: Answer that question. If you want to make any explanation the Court will permit you to do it.

The Witness: I would like to——

The Court: Answer the question first.

The Witness: I did not know it was there, Your Honor, but——

[fol. 240] Mr. Boecker: I submit the answer is not responsive, Your Honor.

The Court: Read the question. Answer the question as asked, and then if you have any explanation you want to make the Court will permit you to do it.

The Witness: All right.

(Question read as follows: I asked this further question: do you deny that a Smith & Wesson .38 was in your basement on the occasion when the police said they found it there?)

The Witness: Is that the one I am to answer?

The Court: Yes.

The Witness: To my knowledge, no.

The Court: Now, if you want to make any further explanation you may do so.

The Witness: Well, not an explanation, Your Honor, but could I ask, if when the police arrested me and they said they found a gun in my car, they put a charge against me. Now, if they found a gun in my house, I would think they would put a charge against me, but there was never any charge put against me.

The Court: Very well. Proceed.

Q. Mr. Boecker: Now, does the Colt .38 use ammunition of that size and pattern? A. I would not know.

Q. Does the gun which you say was in your office that you more or less inherited from your deceased partner, more or less, use that kind of ammunition?

A. I would not know without inspecting.

Q. Well, I am giving you the chance to inspect it.

A. I mean without inspecting the gun and try that in it.

Q. You never have tried such ammunition as far as in the gun at the office?

Mr. Shenker: Just a minute. I object to the line of questioning, if the Court please, that is certainly incompetent, irrelevant and immaterial.

[fol. 241] The Court: Overruled.

Mr. Shenker: Beyond the scope of the direct examination.

* * *

A. I have not tried any ammunition in the gun.

Q. How about the Colt that you had at home, did you ever try any ammunition?

A. I have not tried any ammunition in that.

Q. Did it have ammunition in it on October 29, 1954?

A. October of when?

Q. The occasion when the police came as the result of a reported shooting, October 1954, I believe it was the 29th.

A. The Colt that I have at home now?

Q. Yes, sir. A. Did it have any ammunition in it, yes, sir.

Q. Who put it in there?

A. It was in there when I got it.

Q. You never took any out or put any more in?

A. No, I never had any occasion to.

Q. Have you ever applied for a permit to acquire firearms in the State of Missouri? A. No, sir, I have not.

When I was stopped by Mr. Richters and Mr. Boni I did not have the key for the glove compartment. After getting out of the car, I either unlocked the trunk or helped Mr. Richters unlock the trunk of the Cadillac. I took the keys out of my pocket and we searched around until we found a key that opened it. I do not know whether the same key would have opened the glove compartment. I did not try it . The key that we used on the trunk was not the proper key for that particular car. I turned over only one key from the ignition to Detective Richters.

Q. Mr. Boecker: And if Richters says more than one, he is not stating it correctly, is that right?

A. Well, I would not say lying, but I would say that he was mistaken.

Q. And if Mr. Davis, the garage attendant, says that he [fol. 242] received more than one key, he was likewise mistaken?

Mr. Shenker: Just a minute. I am going to object to that. That is not so because it is contrary to what this witness testified, that he had other keys in his pocket. If the Court please, he said he did turn those keys over to the police.

• • •

The Court: Objection overruled.

I would say Mr. Davis was mistaken.

While we were in the police garage we tried a key out of my pocket that opened the trunk. I don't know if every key that would open the trunk would also open the glove compartment. It was a key that came from a ring in my pocket and not a key that was on the ignition, as there was only one key on that chain.

On that occasion I had receipts from the business in the trunk. The trunk is always kept locked to keep it from bouncing up and down. It was locked before I put the money in the trunk and I opened it with one of the keys from my pocket. I don't know whether that same key would fit the glove compartment or not. It was my in-

tention to take the money out for deposit when I arrived at my destination. I would have unlocked the trunk with the key that I had but I wouldn't say that that key would also open the glove compartment.

While I was down in Captain Doherty's office he asked me how to open the Derringer and I told him that I did not know anything about it.

On the occasion that I was in Granite City in the powder blue Cadillac, I did not go into Mr. Lewis's shop and talk guns. I did not know Earl Lewis. He would have no reason to deliberately lie against me.

Mr. Arnold testified that someone talked to him over the telephone and I was not that person.

Q. Mr. Boecker: Would Officer Richters have any motive to lie against you?

A. I don't know if he would or not; maybe with a little prompting from certain parties.

Q. Is that the way to do business? A. Sir?

Q. Is that the way to arrange these things, somebody [fol. 243] prompts them what to say?

A. I don't know sir, I just don't understand why I am here.

Mr. Klaich did come to me and say that Cannella had his money and he had not heard from him. Mr. Muth had told me that Mr. Cannella had put an envelope in the safe and I asked Cannella what was in the envelope and he said that he had some money to buy something for Mr. Klaich and Mr. Price and he wanted to leave it there for safekeeping and so when Mr. Klaich asked about his money I told him that I didn't think he had anything to worry about since Cannella had left some money with Muth and put it in the safe. I do not recall where this conversation took place. It could have been in his restaurant but I doubt if it was in my office as he was not in my office that many times.

Prior to Cannella's borrowing the Cadillac I had a key to the glove compartment. I had it during the Florida trip. I gave it to Cannella and I did not get it back. I didn't know that I had another key that would operate it.

Q. Mr. Boecker: I believe you also said that this trip to Florida was for the purpose of the health of one of your children, is that right?

A. I did not say the health. I said the healing effect it would have on her eyes after they taken the eyes out and cut the muscles and lengthened them five millimeters and sent her home bandaged up, and she laid there four days and the doctor said he thought it would be a good idea to get her out of this damp weather to give the eyes a chance to heal quicker and probably——

Q. Regardless of that, this was your regular Florida winter vacation, wasn't it?

A. I would not say a regular Florida winter vacation. The Lord knows I would like to be able to take a regular winter vacation.

Q. That was not the first time you took a Florida vacation, was it?

A. I think it was the second time in my life. I am almost fifty years old.

Q. Where did you stay?

[fol. 244] A. Where did I stay? In Florida?

Q. Yes. A. At the Esquire Florida Hotel.

Q. That is no health resort, is it? A. Health resort?

Q. Yes.

A. I did not say I went to a health resort. We went looking for weather, not for a health resort.

I did not know that James Price had one of the guns Cannella had gotten. James Price is a friend of mine and he is not particularly a friend of Cannella's that I know of. I have visited in the Price house and Price has visited in my house. The Mr. James that I have referred to relative to the confusion of the boots that fit over the convertible tops of our cars is Mr. Robert James. He is a service man. He takes care of repairs of automobiles and takes care of the wash rack and the general repairs. He is employed by either Ace Cab or Ace Service Company. He had a black Plymouth convertible, either a 1955 or a 1956 model with a white top. It was an identical car as mine only it was a Plymouth and mine was a Cadillac. There are differences in the cars such as size, trim, price and other features. The tops of the two cars were the same color but the top for his car could not be used for my car but the bags were both identical as they are more or less a standard thing, sort of a patent leather. Practically every one that I have ever seen is the same.

Mr. Boecker: If Your Honor please, as Mr. London, counsel for defendant Cannella, proposes to introduce a witness here, may I ask if the record could show whether Mr. Cannella appeared as a defendant in his case or in Mr. Costello's case, and did Mr. Costello appear as a defendant in his case or Mr. Cannella's case; in other words, is this a joint defense with the parties alternating in the production of witnesses, or may we follow the rule of having each party present his case coherently and continuously? —

Mr. Shenker: I think that might be all right. The only problem is that some things overlap, as Your Honor can well see.

[fol. 245] The Court: Very well. It is a matter very simply to determine. You are asking what?

Mr. Boecker: May the record show that this is a joint witness of both defendants, or if not, may I ask for an order?

The Court: What is the order? Who was the first witness he put on?

Mr. Boecker: Mr. Cannella, defendant Cannella; the second defendant Costello; I presume each testified in his own behalf.

The Court: Who offered Mr. Cannella?

Mr. London: I did, Your Honor.

The Court: And who offered Costello?

Mr. Shenker: I did, Your Honor.

Mr. Boecker: And who offers the present witness, may I ask?

The Court: Who is this witness? What is his name?

Mr. London: I am calling this witness.

The Court: What is his name?

Mr. London: That is Mr. Vicich.

The Court: You are offering him?

Mr. Boecker: May I ask counsel whether they are presenting a joint defense?

The Court: You may.

Mr. Boecker: I will ask Mr. Shenker: are you joining?

Mr. Shenker: No, I am not joining with it, Your Honor. I am only using any parts of the testimony that they offer which fits my purpose, but I am certainly not adopting everything that is admissible as to Mr. Cannella. I think we can save time, however, by adopting some of the testimony which comes in, which we do, but certainly I can't have a joint defense.

Mr. Boecker: May I ask Mr. London if he is intending to join with Mr. Costello in a joint defense?

Mr. London: I think the same thing Mr. Shenker said applies equally well to Mr. Cannella and to me.

Mr. Boecker: May I ask for an order directing the orderly production of these cases one at the time, please?

The Court: Yes, sir, you may. It will be sustained.

[fol. 246] JOHN VICICH testified as follows:

Direct Examination, by Mr. London.

My name is John Vicich. I live at 4042 Cleveland. I am married and I live with my wife. I work out of Local 709 which is furniture and appliance drivers. The work is moving furniture. I have been employed at the Ace Cab Company part time doing odd jobs. I drove a cab part time and I also worked in the dispatching office and part time I worked in the wash rack. This was extra work in addition to my job at Local 709.

I know Mr. Cannella, the defendant, from seeing him down at Ace Cab Company.

In the month of February, 1956, in the latter part of the month, I was in contact with Mr. Cannella about some guns. Several months before that I had been robbed at home and had been burglarized while my wife and I were both in bed and I had been looking for a gun but never went out of my way to get one until the incident was brought up with Mr. Cannella and he said that he had a couple of guns that he would sell and I told him to bring

them down and I would look at them. I was supposed to meet him on Saturday but I took off work on Saturday and did not come in on Sunday, either.

I have a chauffeur's license but I do not have my picture on file as a cab driver at City Hall or with any agency or department in the City of St. Louis. I was not a regular cab driver.

Mr. London: You may inquire.

Mr. Boecker: Does Mr. Shenker have any cross-examination?

Mr. Shenker: Not at this time.

Mr. Boecker: Well, I think it is the proper time if he has any.

Mr. Shenker: Sir?

The Court: Proceed.

Mr. Boecker: May it be understood that Mr. Shenker waives cross?

The Court: Mr. Shenker is waiving that, I take it, any cross-examination.

[fol. 247] Mr. Shenker: At this time I have no questions to ask him. If I should I will ask the Court for permission to ask them.

The Court: Proceed.

[fol. 248] Cross-Examination, by Mr. Boecker.

I drove an Ace cab on some occasions and that would be prior to February 1956. I did not know that it was necessary to have a license issued from City Hall to be a cab driver. I had a regular chauffeur's license on which my picture was taken. I did not have any other license. I inquired about these guns on some date which I looked up. I felt sort of guilty and I felt more or less responsible since I had asked Mr. Cannella to bring the guns down and when I read about Mr. Costello being arrested in the paper I felt guilty. I did not call Mr. Costello or Mr. Cannella.

The feeling of guilt stayed with me up until the present time when I volunteered my services. I volunteered my

services when a lawyer contacted me. Mr. London contacted me I think the day before yesterday. Once before a lawyer contacted me and inquired about it and I gave them the story but since then nobody approached me until Mr. London did. The first contact by the lawyer was about a week or so after Mr. Costello's arrest. I was contacted at my home at that time, in the early part of the evening. There was just one person and he said he was a lawyer. No name was given. He did not say whom he was representing. He did not show me or give me a business card or show me any means of identification. He asked me about the guns and I told him what happened. He did not say how he happened to find me.

I would say he was about six foot tall and about medium build. I would say his complexion was fair. I would know him if I saw him again. I noticed nothing unusual that would help to identify him. He did not wear glasses and he did not have a mustache. I did not notice whether he had a full head of hair or was wholly or partially bald. I would say he was in his late forties. I could not specifically describe his nose. I do not know what color eyes he had.

I told him exactly what I have just told the court about meeting Mr. Cannella and asking him to bring the guns down. He wrote something down. I did not sign anything. I was not given a copy of anything that was written. He was with me about fifteen to twenty minutes. That was [fol. 249] the only time I have ever seen the man and this happened a week or two after Costello's arrest.

Mr. Boecker: That is all.

Mr. London: Would you mark this please?

(Several pieces of paper, were marked as a group Defendant's Exhibit C.)

Mr. Boecker: Your Honor, counsel for Mr. Cannella had just handed me some papers marked exhibits. Now, I am sure he understands court procedure, and he has concluded his direct examination, permitted me to cross-examine. Now, I take it he wants to reopen his examination in chief with this same witness. This whole defense procedure is highly irregular. I want to object to his re-

opening the examination in chief at this time without showing good cause for having abandoned it.

Mr. London: If the Court please, I believe it is proper. Mr. Boecker has gone into many things.

The Court: Take this up side bar, out of the hearing of the jury.

(There was a side bar conference between the Court and counsel, during which the following occurred:)

Mr. London: Your Honor, what this is is some checks which this gentleman received from the Ace Cab Company. Mr. Boecker asked various questions about whether this gentleman knew——

The Court: What?

Mr. London: Mr. Boecker has gone into areas that could cast doubt upon this witness, and in so doing has attempted to infer that this witness had no connection with the Ace Cab Company and merely tried to impeach his testimony in every respect. I think it is improper.

Mr. Boecker: I don't think I impeached him at all on the question of employment.

The Court: What?

Mr. Boecker: I did not impeach him at all in the question of his employment, on the fact of his employment.

The Court: Well, do I understand you now want to go [fol. 250] into the question of these checks just in order to have them introduced and explain to show that they are a permanent record of the fact this man was employed by the Ace Cab Company?

Mr. Shenker: At the time.

Mr. Boecker: I would not object to proper redirect examination. At best the evidence proposed would be merely cumulative. The witness has testified he was employed.

Mr. Shenker: Well, he is certainly entitled to show by documentary evidence he was employed there.

Mr. Boecker: As part of his examination in chief he would be.

Mr. Shenker: Suppose we called him back. All it amounts to is just offering the witness now. You can still examine the witness on that.

The Court: He has testified he was employed by the Ace Cab Company.

Mr. Shenker: He is just going to identify the checks. The checks can be identified in evidence.

The Court: He has testified he was employed.

Mr. Shenker: I think that is pertinent in time, you have corroborating testimony.

The Court: Has that been challenged at all?

Mr. Shenker: I think he has.

The Court: By what?

Mr. Shenker: When he asked him, you drove a cab and didn't have a license. I think he challenged it.

Mr. Boecker: Well, the checks are no evidence that he drove a cab anyway, or evidence that he got paid money.

The Court: There is nothing before the court. You just simply called it to my attention that they handed checks to you. There is nothing for the court to rule on.

(The trial was then resumed before the jury, and the following occurred:)

Redirect Examination, by Mr. London.

Q. Mr. Vicich, I hand you what has been marked as Defendant's Exhibit C, which is seven pieces of paper. Would [fol. 251] you tell this court and jury what those are, please?

Mr. Boecker: I will object to any reference to the exhibits for the reasons heretofore stated. I think the record already shows from colloquy at the bench what the exhibits are.

The Court: I think so. It was presented to the Court at the bench out of the hearing of the jury, and it has been evident, I think, what the Court's ruling would be. Objection sustained.

Mr. London: If the Court please, may the statements which we made at the bench be incorporated into the record as our offer of proof in this matter, or do you want us to make an additional offer?

Mr. Boecker: I think that may be stipulated, and I will make the same objection to the offer.

The Court: They may be treated as an offer of proof. The objection is sustained to the offer.

Mr. London: If Your Honor please, then to make sure that the record is completely clear, since we were discussing that rather informally——

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. London: May the record show that Defendant's Exhibit C consists of seven checks made out to the order of John Vicich, each check being duly cancelled, checks bearing dates January 9, January 16, Januray 23, two checks on January 16.

Mr. Shenker: One is Ace Cab.

Mr. London: One is Ace Cab and one is Ace Service Company; February 27, March 5, and March 11, 1956. This exhibit is being offered to show that this witness did work for the Ace Cab Company or the Ace Service Company during the week in question, more particularly February 24, the week of February 24, 1956.

The offer will further show that if this witness were allowed to testify as to these checks he would testify that he personally received these checks, that he personally endorsed these checks, and that he cashed these checks, and that these checks were in payment for services rendered to [fol. 252] either Ace Cab Company or Ace Service.

Mr. Boecker: Objection for the reasons heretofore stated.

The Court: Objection sustained. Offer denied. Proceed.

(The trial was then resumed before the jury, and the following occurred:)

Q. Mr. London: One last question, Mr. Vicich. You did testify, did you not, that you have a chauffeur's license? A. Yes, sir, I do.

Q. That you did not know you had to have your picture on file at the City Hall to drive a cab, is that correct?

A. No, sir, I did not. I thought that was all I needed was a chauffeur's license.

* * *

DUNCAN DAVIS testified as follows:

Direct Examination, by Mr. London.

My name is Duncan Davis. I live at 6530 Bartmer and I live at that address with my wife. I am employed as a supervisor at the Ace Service Company. The Ace Cab Company is also located there. On Sunday, February 26, 1956, at some time before noon I had occasion to be at the lot of the Ace Cab Company. I was there working on my car.

As I was working on my car, Mr. Cannella, the defendant, drove up in Mr. Costello's Cadillac and got out and came over to his cab which was parked next to my car and took a package from a cab and turned around and got in the Cadillac and drove off in the Cadillac.

I left the lot between twelve-thirty and one o'clock and Mr. Costello was still there. Mr. Cannella had not returned.

Cross-Examination, by Mr. Shenker.

On the day of Mr. Costello's arrest, February 27, 1956, [fol. 253] I recall a statement made by Mr. Cannella pertaining to Mr. Costello's arrest, and pertaining to Cannella's getting a package and putting it in Mr. Costello's car.

Q. Mr. Shenker: What did Mr. Cannella say?

A. He said that——

Mr. Boecker: I will object. That appears to be calling for a self-serving statement.

Mr. Shenker: If the Court please, this would be a statement made by someone other than the defendant Costello,

and certainly we are permitted to introduce evidence of a statement of that nature. It could be considered a statement against interest if it could be so considered.

Mr. Boecker: Unless it is part of the res gestae, I submit it would be self-serving.

The Court: Sustained.

Mr. Shenker: I would like to make an offer of proof.

(There was a side bar conference between the Court and counsel out of the hearing of the jury during which the following occurred:)

Mr. Shenker: It is sought to establish by this question that this witness, if he were permitted to answer the question, he would state that after Mr. Costello's arrest and release on bond on the 27th day of February, 1956, that he heard Mr. Cannella say that it was all his fault, that he put those guns in the car and did not tell Mr. Costello about it and that he is responsible for Mr. Costello being in difficulty.

Mr. Boecker: I object to it as self-serving and hearsay

The Court: Objection sustained. Offer denied. Proceed.

Cross-Examination, by Mr. Boecker.

I was busy doing mechanical work on my own car and did not pay too much attention to the nature of the package.

WILLIAM H. MANLEY testified as follows:

Direct Examination, by Mr. London.

[fol. 254] I am employed at Ace Cab Company and have been working there since December, 1953.

On Sunday, February 26, 1956, I was at the Ace Cab Company lot shortly before noon. I was there gassing up my cab as I was driving that day. I saw Mr. Cannella pull the boss's Cadillac down in front and put a package into the car. He got the package out of his cab and put it into the Cadillac. During the time that I have worked

at the Ace Cab Company I have seen other supervisors using the Cadillac or Oldsmobile that Mr. Costello had. It was not unusual.

Cross-Examination, by Mr. Shenker.

Q. I will ask you, Mr. Manley, to please state if, after Mr. Costello was arrested, you heard Mr. Cannella say anything as to what he put in that car and as to the blame for the arrest of Mr. Costello.

Mr. Boecker: I object to the statement, the answer called for as hearsay, self-serving, not part of the res gestae.

The Court: Objection sustained.

Mr. Shenker: Same offer of proof as made in the other case.

The Court: Well, it may be considered.

Mr. Boecker: Same objection.

The Court: The objection is sustained; offer denied. Proceed.

Mr. Shenker: That is all. I have no further questions.

Cross-Examination, by Mr. Boecker.

I recall that it was Sunday, February 26, 1956, since it was the next day that I was talking to Cannella about Joe getting arrested.

Q. Mr. Boecker: When was your testimony first brought up, the matter of you coming here to testify?
A. I had an interview with Mr. Shenker.
Q. When was that? A. Oh, quite some time ago, sir.

The Court: About how long ago?

The Witness: Oh, about six months.

* * *

[fol. 255] ROBERT L. JAMES testified as follows:

Direct Examination, by Mr. London.

My name is Robert L. James. I live at 4006 Lee Avenue with my wife and two children. I work at the Ace Cab Company in the maintenance department and in the management of the station. On February 26, 1956, I got to the lot around eleven-thirty to check over and make sure the wash rack and everything was going all right. I saw Mr. Costello coming out of church and I talked to Mr. Feldman at around noon, and at about two o'clock I drove Mr. Costello home.

Earlier while I was talking to Mr. Feldman outside the grease rack Mr. Cannella drove by and stopped at the end of the building and got out of Mr. Costello's car and went over to his cab and got a package and got back into Mr. Costello's car and drove off in the Cadillac. Later Mr. Costello told me that Mr. Cannella had borrowed his car and he (Mr. Costello) had two packages of some envelopes and stuff that he had to count up for the insurance and stuff on the cabs and pay some bills and he said he had an awful lot of work to do and I drove him home. I have seen Mr. Cannella and other supervisors driving cars belonging to the Costello family. There was nothing unusual about that.

Mr. Shenker: * * * In view of the Court's statement about procedure, there are some other matters I want to question this witness about, or whether I am to offer him again or proceed now. I can offer him again after Mr. London finishes with his testimony.

Mr. Boecker: I will waive the objection to this witness since they both have the same witness, provided it is understood that he examines him in the manner of examination in chief and not cross-examination.

Mr. Shenker: Some of it may be cross-examination and some——

The Court: He was put on the stand as Cannella's witness now, and finish the cross-examination of Mr. Cannella's witness and make him his own witness.

Mr. Boecker: I have no objection.

[fol. 256] Mr. Shenker: Very well.

Questions by Mr Shenker:

I am vice-president of the Ace Cab Company and I was on February 26, 1956. On that day I saw Cannella take something from his cab and put it into the Costello automobile. This was right after Mr. Costello came back from church which was around twelve o'clock noon. I later took Mr. Costello home at about two p. m. in my automobile. At that time, Mr. Cannella had not brought the Cadillac back. While I was at the lot that afternoon he had not brought the Cadillac back, which was around two p. m. On the next day Mr. Costello was arrested.

Q. Mr. Shenker: And I will ask you to please state if, after that, whether you heard Mr. Cannella make a statement pertaining to the fault for Mr. Costello being in trouble with reference to the guns that they found in that automobile,

Mr. Boecker: I object to that as hearsay, self-serving statement.

Mr. Shenker: Same offer of proof, Your Honor.

The Court: Sustained.

Mr. Shenker: Very well. I will not pursue that further, then.

The Court: If you desire, it may be treated as the same offer, same objection, and same ruling. Proceed.

Mr. Shenker: Very well, Your Honor, thank you.

In April, 1956, I had a 1956 Plymouth convertible which was black and white. The body was black and the top was white.

[fol. 257] I have a bag in the trunk of the car into which the top is put. There was a gun in the bag in the back of my car. In some way or another that bag got switched and was put in Mr. Costello's car and the gun was in it at the time. The bags for the Plymouth and the Cadillac are very similar. They are both black oilcloth. You can hardly tell them apart except for the fitting to the top. The only way to find out would be to open it up.

I had the gun around my house for three or four months and my wife told me to get rid of it for fear that the children would get it and I had it in the glove case for about two weeks and I then put it in the bag in the back. It then got mixed up and got into his car. I did not put it in his car and neither did Mr. Costello, as far as I know. Our cars were washed and vacuumed on the same rack. Ace Cab and Ace Service Company gas around three hundred automobiles a day and wash around fifty or sixty a day.

I have authority to co-sign checks with Mr. Muth. Defendant's Exhibit C includes a payroll check for dispatching services for the radio dispatcher issued by the Ace Cab Company and one is issued by the Ace Service Company. The checks are made payable to John Vicich.

Mr. Shenker: I now offer into evidence, if the Court please, Defendant's Exhibit C which consists of seven checks dated from January 9 to March 11, 1956.

Mr. Boecker: I will object to the offer because these Exhibits have not been connected up with any evidence in this case. This witness has identified them as checks paid for dispatching services. That is not the theory of the defense at all, paid for dispatching.

Mr. Shenker: Your Honor, this evidence is offered to show that John Vicich was an employee of the Ace Cab Company and he so testified that he was working as a dispatcher.

Mr. Boecker: I object to Mr. Shenker putting the words in the witness's mouth by making a supposed speech to the Court in the witness's presence.

Mr. Shenker: If the Court please——

The Court: Don't make those statements within the hear-
[fol. 258] ing of the jury and hearing of the witness and everyone else. Objection sustained.

Mr. Shenker: I believe that is all I have of this witness, Your Honor, at this time.

Cross-Examination, by Mr. Boecker.

The gun that was in my 1956 Plymouth convertible was a Smith & Wesson five-shot .38 caliber snub nose revolver.

I don't know what the serial number was. It was a gun like Government's Exhibit 6. The gun was given to me by Mr. Oliver Rohlfing, who at the time owned some cabs at the Ace Cab Company. He lived down in South St. Louis somewhere, I don't know just where. I don't recall the exact date that he gave me the gun but it was around the latter part of 1955.

I was at the cab company when he gave me the gun. I believe it was outside but I don't recall right off hand. I told him that I wanted a gun for around the house and asked him if he knew where I could get one. I don't recall anyone else being there when I asked him. The topic just came up in the general conversation. I don't remember whether I was standing up or sitting down but I remember talking to Mr. Rohlfing. It was during the day but I don't remember what time it was. I imagine it was daylight. I don't recall whether it was a warm or cold day or whether it was winter or summer. It was in the latter part of the year and I imagine it would be winter. It could have been between Thanksgiving and Christmas but I can't recall the exact date, I could not pin it down to any particular time or whether it was between Halloween and Thanksgiving. It was possibly within the last three months of the year.

I am around the lot all day and on the day in question when the conversation about the gun took place I cannot remember whether I saw school children around at the time or whether it was vacation time. I do not recall whether I was wearing a coat for cold weather or whether I was dressed for summer.

Mr. Rohlfing said that he had a pistol that he would give me. He told me that I had done him a lot of favors with reference to taxicabs and tire repairs and things like [fol. 259] that and later he gave me the pistol. It was given to me about two days after I talked to him. I would say it was in the latter part of the year, the last three months of the year, but I don't know whether it was fall, winter or summer, or what particular day, I don't recall exactly where I was when it was given to me.

This is the only time that I know of that a pistol was given to me. I would say it had a value of around forty-five or fifty dollars but I have no recollection of the exact place where the gift was made.

I took the gun out of my house sometime after Christmas. It had been in the house around two or three months. After Mr. Rohlfing gave me the gun I took the gun home. I imagine I put it in my pocket as I took it home. I believe it was loaded when I got it. I believe it was fully loaded with five shots. When I got it home I put it in the top of my closet in the bedroom. I may have removed it from there to show it to somebody. I can't recall whether anyone else besides my wife and I saw it, but possibly I may have showed it to someone.

Mr. Rohlfing is not operating cabs any more. I think he went broke and into receivership. I do not know of his present whereabouts. He was the owner of Ace Cabs for about a year. I do not know the exact dates. I would say that it included part of the year 1955. At that time I knew of no other Rohlfing who owned Ace Cabs. He later formed a corporation with another person under the name B & R Service, I believe.

When I took the gun from my house I first put it in the glove case and I later put it in the black bag in the back of my car. The black bag is part of the equipment of the car. The bag is to hold the boot which covers the top when the top is down. I don't know if the black bag had any markings or letterings or trademarks or instructions on it.

My car is washed almost every day and so is Mr. Costello's. The attendants are familiar with both of our cars.

On February 26th when I drove Mr. Costello home, he had two packages. They were black bags with zippers on them.

[fol. 260] Redirect Examination, by Mr. Shenker.

The packages had envelopes in them containing money from the various cabs that came in while Mr. Costello was out of town.

WILLIAM A. LAIRD testified as follows:

Direct Examination, by Mr. London.

I work at the Ace Cab Company in the City of St. Louis and have been so employed for about five years. I work for the Ace Cab Company as a claim adjustor.

On February 26, 1956, Sunday, shortly before noon, I was at the Ace Cab Company lot and I saw Mr. Costello and Mr. Cannella there. Mr. Cannella asked to borrow Mr. Costello's automobile. Mr. Costello gave him the keys and told him to go ahead and Mr. Cannella left. I have seen Mr. Cannella use a car of Mr. Costello's before. I have also used it myself.

Mr. London: No further questions.

Mr. Shenker: I have a number of questions of this witness who will be my witness, Your Honor—for the purpose of having cross-examination of this witness. I have some questions which would make him my witness. Now, under the order of proof, I suppose I better wait and call him back for my own purposes.

Mr. Boecker: I presume he may be cross-examined, and then proceed to direct examination. I have no objection.

The Court: Keep it separate, your cross-examination, and then examine as your own witness.

Mr. Shenker: I want to save the time, but I don't want to find myself in conflict with the request Mr. Boecker made and which the Court ruled, we should keep them separate.

Mr. London: As a matter of procedure, Your Honor, it is rather difficult for me to know when Mr. Shenker's cross-examination ends and at which part the direct examination begins so I will know what part I can cross-examine.

The Court: It is a very simple matter. He can state when he ends and makes him his own witness. I can't imagine anything simpler.
[fol. 261] It is only five minutes to the time to recess. We will recess at this time to two o'clock. It is a very simple thing. Mr. Shenker is cross-examining as your witness, and then announce he is making him his own witness, and proceed from there.

Mr. Shenker: Thank you.

* * *

Cross-Examination, by Mr. Shenker.

I am a claim adjustor for Ace Cab Company and have held that position for about five years.

Q. Mr. Shenker: Now I will ask you to state if in connection with that, sir—and as far as the record is concerned, Your Honor, that part may be treated as direct examination so that Mr. Boecker can cross-examine on it if he so desires.

The drivers work on more or less a rental basis. They pay the company a certain amount per day for the cabs and whatever they receive is theirs.

The money is paid to the company and a certain amount is taken out for the finance company and a certain amount for insurance and proration, and so on. Quite a few of the cabs, however, are not owned by the company but are individually owned. Each driver making a payment uses a little brown envelope showing the name, the cab number, the date, and the amount of money in the envelope. For any repairs they put in a repair slip and that is considered for cash.

In January and February of 1956, there were cars in operation which Mr. Costello was personally obligated to make the finance payments and to make the payments for the insurance, and so on, and these cabs were operated by the various drivers for the Ace Cab Company. The money was put into a brown envelope by each driver every day. [fol. 262, 263] The envelope into which the driver puts whatever money he owes for that day is put into the safe and after that we take out what is supposed to be taken out. We have two safes over there. When they first come in they go into the outside safe. The driver gives it to the person at the window and he puts it into the outside safe. Mr. Tom Wilson is in charge of that safe. It is then taken out of the outside safe by Mr. Mueth, Mr. Wilson or Mr. Costello and put into the inside safe. Mr. Mueth is secretary-treasurer of the company. Mr. Wilson is the dispatcher. He is in charge of the drivers as they go out with the cabs. Mr. Mueth is in charge of the inside safe.

Prior to February 26, 1956, Mr. Costello was out of the city for about three weeks. I lived in his house while he was gone. I believe he returned on a Thursday evening or late Thursday night. Mr. Costello did not work on the receipts to make the distributions for the mortgages and so forth on Friday or Saturday as he said that he would rather do it at home and he would not be bothered. He took them home with him on Sunday in little leather bags

that we have. The bags are black and have a zipper. Mr. Costello removed two bags from the safe and the envelopes were already in the bags. Bob James then drove Mr. Costello home. That was right around two or probably shortly thereafter. At the time the Cadillac Mr. Costello drives was not on the lot or anywhere at the premises. I stayed around for awhile and then I closed up and went home. I locked up the office as I usually do that all the time. At the time that I locked up, Mr. Costello's car had not been returned.

I had Mr. Costello's Oldsmobile for three weeks while he was gone. Mr. Costello would also loan me the Cadillac or the Oldsmobile if I would ask him. Almost anyone on the payroll could get it if they asked for it. Drivers are not on the payroll but it is possible for a driver to also have some other position and therefore be on the payroll. As a driver, he would be paying himself and when he [fol. 264] would work in the office the company would pay him. It is quite common in our company for someone to work as a driver and also to do other work in the office.

The following day, which was Monday, the payments to the finance company went to Grandel Square.

My duties also consist of hiring and discharging drivers. As claim adjuster it is my responsibility to keep accidents down. I also check drivers for safety and follow them around at times to check them.

Cross-Examination, by Mr. Boecker.

I live with my family in East St. Louis. When I stayed at the Costello house while he was in Florida I did so as a voluntary matter. I would not say that I was there as an employee.

On February 26th I saw Mr. Costello take two black bags from the safe and when he went home he put them into Mr. James's car. I cannot say what was in the black bags but that is how we carry money. I can't see through the black bag. I was at the office that Sunday since there had been an accident on Saturday night and I went down to go over the reports and things like that. From my desk I can see the front and rear. I did not see Mr. Cannella take a package from his cab and put it in the Cadillac. I don't know whether that happened or not.

JOSEPH P. MUETH testified as follows:

Direct Examination, by Mr. London.

I am employed by the Ace Cab Company as secretary-treasurer. I am generally engaged in office work at the Ace Cab Company.

I have access to the safe at the Ace Cab Company, that is a combination safe to which I have the combination.

Sometime in the latter part of 1955, Mr. Cannella gave me an envelope and asked me to put it in the safe, which I [fol. 265] did. I then advised Mr. Costello of the fact that I had put it in there for safekeeping. Mr. Cannella left the envelope in the safe for approximately ten days to two weeks and he then asked me for it and I gave it to him. I gave it to him somewhere between the middle and the latter part of December of 1955. To my knowledge while the envelope was in the safe, it was disturbed in no way or removed by nobody. I do not know what was in the envelope and I did not ask Mr. Cannella what was in it. The envelope was sealed and it was sealed when I returned it to Mr. Cannella. I returned it to him at his request.

Defendant's Exhibit C consisting of seven checks are checks made out to John Vicich, the green checks being for payroll on the dispatching board and the yellow check is for services on the gasoline pump. The green checks are dated January 9, 16, 23, February 27, March 5, March 11, 1956, and the yellow check is January 16, 1956. They are all made payable to the order of John Vicich and all of the checks have been cancelled through a bank.

Q. I will ask you further, Mr. Mueth, if all of those checks have been endorsed?

Mr. Boecker: Well, I will object to any further questions until such time as these checks may properly be received in evidence as exhibits. He has been asked to identify them. Now he is going to give the contents, which I object to.

The Court: Sustained.

Q. Mr. London: Mr. Mueth, does your name appear in any place on any of these checks?

Mr. Boecker: Same objection.

Mr. London: I think in laying the foundation, Your Honor, I am entitled to show the witness had some prior dealings with these checks.

Mr. Boecker: I have no objection based on the identification that has already been made. I object to revealing the contents until such time as they are received in evidence.

* * *

The Court: Objection sustained; premature, I think.

[fol. 266) Mr. London: I am trying to establish the foundation preparatory to introducing these checks into evidence.

The Court: I am perfectly agreeable to you doing that. I doubt if that is the way to do it.

Q. Mr. London: Mr. Mueth, I will ask you if in your capacity at the cab company, the Ace Cab Company, you have the authority to sign checks of the company?
A. I do.

Mr. Boecker: I object to that. It is not germane to the line of inquiry. We are still concerned with the introduction of these checks.

The Court: They have not been introduced in evidence yet?

Mr. Boecker: They have not been offered. They have been identified.

Mr. London: I am trying to lay the foundation at this time, Your Honor.

Mr. Boecker: I object to any further questions relating to them until they have been offered.

Mr. London: I can offer them, Your Honor. I think it would be better to have the record show specifically this witness's knowledge of the checks.

Mr. Boecker: He testified they were checks paid to John Vicich for dispatching services as to some, and gasoline pump service.

The Court: He testified to that without any obligation?

Mr. Boecker: Yes.

The Court: What more do you want?

Mr. London: I want to establish his knowledge of the fact that these checks were paid, what he was doing. I asked him to whom these checks were made payable.

Mr. Boecker: He testified without objection that they were endorsed and cleared through the bank.

Mr. London: I will be very glad to offer them into evidence at this time, Your Honor. I just think the record would be more clear on the point if this witness were allowed to state his connection with each of these checks; but if the Court wishes——

[fol. 267] The Court: You introduced them in evidence?

Mr. London: I will be very glad to offer them in evidence at this time.

Mr. Boecker: I will object because evidence identifying these exhibits shows they are not connected up with any issue in the case or any material evidence in the case, as being checks paid for gasoline pump services or dispatching services; no relation to this case.

Mr. London: I believe it has relation, Your Honor.

Mr. Boecker: Mr. Cannella testified Mr. Vicich was a taxi driver. Mr. Vicich testified he was a taxi driver. The checks relate to times he was supposedly employed as a taxi driver.

Mr. London: Mr. Vicich testified he was a taxi driver at times, also did these odd jobs around the taxicab company such as a dispatcher.

Mr. Boecker: My recollection is Mr. Cannella's testimony on which it is all founded was that he had dealings with Vicich as a cab driver.

The Court: Objection sustained.

Mr. London: If the Court please, an offer of proof which we made previously relative to this exhibit, may it be incorporated into the record as an offer of proof at this time also?

The Court: Do you hear the offer that is being made?

Mr. Boecker: Excuse me. The same objection is made as to the offer of the exhibits.

The Court: Sustained.

Q. Mr. London: Mr. Mueth, I will ask you if you know from your own knowledge whether John Vicich ever drove for the Ace Cab Company? A. Yes, sir.

Q. He did drive for the Ace Cab Company? A. Yes, sir.

Mr. London: I believe that is all.

Cross-Examination, by Mr. Shenker.

I am the secretary-treasurer of the Ace Cab Company, and also office manager and bookkeeper.

[fol. 268] Q. Mr. Shenker: Now, I will ask you if you will please state the procedure that was followed insofar as taxicab drivers paying money for the daily budget or the weekly budget, or whatever you call it.

Mr. Boecker: I object to that unless it is limited to specific issues in this case.

* * *

Mr. Shenker: That is again, Your Honor, in line with the testimony that we offered by the previous witness to show the procedure that was followed, and then what Mr. Costello did there that Sunday, because this man is the secretary-treasurer and he is in charge of the safe and of course he would be in position to know.

Mr. Boecker: I have no objection to Mr. Mueth testifying that they had receipts there that day, and I will so stipulate. I do not know why we need to go into the general practice of taxi companies and all around on that.

The Court: Isn't that sufficient?

Mr. Shenker: It may be sufficient, Your Honor.

Mr. Boecker: I will even stipulate as to the amount of the receipts, if you care to.

Mr. Shenker: Will you stipulate as to the length, the period of time the receipts were involved?

Mr. Boecker: I presume it was while he was on his Florida vacation.

Mr. Shenker: That is right.

Mr. Boecker: I will so stipulate.

Mr. Shenker: And you will stipulate those receipts were contained in the bags that he took home?

Mr. Boecker: I think so.

Mr. Shenker: All right. And that they were in separate envelopes as they put it?

Mr. Boecker: Well, if that is necessary. We will cross that bridge when we get to it.

Mr. Shenker: We can cut this short then considerably on that basis.

[fol. 269] On that particular Sunday I was at the office. I do not work every Sunday but I am there quite often on Sunday. On that particular Sunday I was there since my cab had been involved in an accident. It had struck a pedestrian and was considered a major accident. It led to a big lawsuit.

The envelopes that are turned in daily are turned over to me by Mr. Wilson and I put them in the safe. I do not know how many envelopes were turned in during the period of time Mr. Costello was away and I do not know how many cabs were involved during that period. An envelope is turned in by every cab driver who does not own his own cab and he turns in such an envelope after every shift. The majority of them do not own a cab.

On the Monday after Mr. Costello's arrest, I used some of the money to pay the special insurance account and the Ace Cab Company account and also to pay the loan company.

John Vicich has not worked for the Ace Cab Company for months.

When I put the envelope for Mr. Cannella in the safe, I advised Mr. Costello of it since it was a private safe and I wanted him to know to whom it belonged if he saw it in there. Previously Mr. Costello had been called upon to pay back some money because of a burglary in which some money was taken out of the safe.

Cross-Examination, by Mr. Boecker.

When Mr. Cannella gave me the envelope he just asked if I would keep it for a couple of days as he had something he wanted in safekeeping. He did not say what it was and

did not say for whom he was keeping it or whether it was his or somebody else's. When I mentioned it to Mr. Costello I just told him that Cannella had given me an envelope and asked if I would keep it. I told him that I put it in the safe and asked him if it was okay to keep it there and he said okay. He made no mention of whether he knew anything about it.

I am an officer of the company and I am concerned about operating the business at a profit. I do not check on the drivers. As I am in the office I very seldom am in touch with the drivers. I knew that John Vicich was driving a [fol. 270] cab. I have seen him around there quite a few times. When a man drives a cab he is to have his license displayed in the cab. I never saw whether Vicich had a license or not as I never check on any drivers. They are supposed to show their licenses to Mr. Wilson.

Redirect Examination, by Mr. Shenker.

At Ace Cab we have licenses for one hundred and twenty-five cabs. Some of them work with only one driver but the majority work with two drivers. We have approximately two hundred and twenty-five drivers.

JOSEPH A. STUCKEL testified as follows:

Direct Examination, by Mr. Shenker.

All of last week I was under subpoena by the Government in this case.

I am a neighbor of Joe Costello. Our houses are about one hundred and fifty feet apart. In February of 1956 on a Sunday, I had occasion to talk to Mr. Costello about [fol. 271] a battery. I called Mr. Costello at about two-fifteen Sunday afternoon, February 26, and asked if he knew where I could purchase a battery. He asked me to hold on and in a few seconds he said that he could get me one. Later, he and another party came with a battery. They came in a 1952 Cadillac four-door. It was either light grey or light cream in color. They came with the battery at about six-thirty in the evening. At that time the Costellos had a black Cadillac convertible. I did not see it on that particular day as I had no occasion to see

it. I did not leave Magnolia Avenue and I could not see it when I looked out my window or door. I recall that this took place on February 26, 1956, because when I paid Mr. Costello for the battery I made a note of it for tax purposes. Also, the next day I heard a radio broadcast that Mr. Costello was arrested. That was on a Monday.

Cross-Examination, by Mr. Boecker.

I am not in a position to testify as to whether the Costello Cadillac was or was not at his house on that day.

DON STUCKEL testified as follows:

Direct Examination, by Mr. Shenker.

I am seventeen years old. I am the son of the witness that just testified.

I know Mr. Joe Costello and I have known him for some period of time. I recall the incident concerning a battery on a Sunday in February of 1956 and I was there when my father called Mr. Costello to get him to help in getting a battery. A battery came at around six-thirty. I had been working on the car for about forty-five minutes after my father called.

The battery came about six-thirty. It was brought by Mr. Costello and another man whom I don't know. The other man was about five foot ten and weighed about two hundred pounds. They brought the battery in a '52 Cadillac. It was light grey or light cream. I was taking [fol. 272] the old battery out and this other man and Mr. Costello tried, but they could not get it out. Mr. Costello said that they were going to be late for dinner and so they left but they left the new battery with me. Dad and I then worked on the old battery and got it out and put the new battery in, and we put the old battery in a box and Dad said to take it over to Mr. Costello's house, which I did. I took it over there that same evening.

I drove around to the court and parked alongside of the '52 Cadillac and walked up to the door and knocked and this other man gave me the keys to his trunk and told me to put the battery in there, which I did. I then brought the keys back to the man and drove home. The court is

sort of a semi-circle and there are about eighteen to twenty horses there. At that time, the Costellos owned a black Cadillac convertible.

It took me about five minutes to park my car, go to the door, ring the bell, get the keys and then take the battery from my car and put it in the other car, lock the trunk and take the keys back, and then get into my car and leave.

During that period of time I do not think the Costellos' 1956 Cadillac convertible was there because if it had been I would not have been able to park, but I remember that I could have parked in back of this '52 Cadillac but instead I just pulled up alongside so it would be no trouble to take the battery out. I don't think the Costellos' Cadillac was there.

Cross-Examination, by Mr. Boecker.

I had no opportunity later that evening to observe whether Mr. Costello's car was returned to his house. It was about seven-thirty or eight o'clock in the evening when I was at the Costello house for about five minutes.

Mr. Shenker: May it please the Court, we would like to offer into evidence at this time Defendant's Exhibit D, which is a photostatic copy of the title to a motor vehicle, to Barbara Costello at 2626 Gurney, St. Louis, Missouri, and it shows that it was issued by the Department of [fol. 273] Motor Vehicles, City of St. Louis, on December 1, I think it is 1955.

And we would like to offer into evidence Defendant's Exhibit E, which is a photostatic copy of a certificate of title issued by the State of Missouri to Barbara Costello, 2626 Gurney, St. Louis, Missouri, for a Cadillac, and it is dated, it shows the date on there as January 15, 1956, and that the filing date in there was February 9, 1956, and the filing in the Department is February 9, 1956. The date January 15 is the time when it was paid. So that is a different stamp on there, Your Honor, that is on the body of it.

Mr. Boecker: No objection to the two exhibits just described.

(Defendant's Exhibits D and E were received in evidence.)

Mr. Shenker: And we would like to offer into evidence, if the Court please, Defendant's Exhibit F, which is a certified copy from the Clerk of the Circuit Court of the County of St. Francois, and it relates to the information that was filed against George Costello, and it alleges that on the 26th day of May, 1935, at St. Francois County, in the State of Missouri, there was a breaking into a business establishment. The purpose of this offer is, if the Court please—we are contending in line with the contentions we have previously made that this conviction in 1936 is not one that is covered by the statute in this specific instance.

The Court: Why not?

Mr. Shenker: On the ground that this statute provides for a burglary, that is the statute under which Mr. Costello is being tried provides that one who has been convicted of burglary, and we contend that burglary in the second degree is not a burglary that is provided for in this statute; and I should like in connection with this information, if the Court please, I should like to introduce into evidence Section 560.070 of the Revised Statutes of Missouri, 1949, Your Honor.

The Court: Let me see that.

Mr. Boecker: May I be heard?

I object to the offer of Exhibit F, being the Information filed by the prosecuting attorney in the State of Missouri [fol. 274] against Costello, as being incompetent in that it is a collateral attack on the judgment which is already in evidence as Government's Exhibit 1, which shows it to be a judgment of guilty of burglary and of larceny.

The Court: Objection sustained.

Mr. Boecker: And I object to the introduction of the statutes, because that is a matter of law for the Court and incompetent as a matter of evidence.

The Court: Sustained.

Mr. Shenker: May I make an offer of proof on that, Your Honor?

The Court: On which?

Mr. Shenker: Of this Exhibit F.

The Court: Very well.

(There was a side bar conference between the Court, and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. Shenker: The Exhibit F is offered in evidence for the purpose of clarifying that which—the judgment is not clear. The judgment in itself provides that there was a conviction of burglary, but it refers to the Information, as charged in the Information, that the judgment itself, the judgment of conviction recites it was a conviction of burglary and larceny, and then it refers to the Information. Now, it is in itself not complete, and the only way it can be complete is by having the information, and the same to which the judgment refers, and the Information is the thing that is embodied in the judgment and, therefore, it is a necessary part of it, and we submit that it is offered for the purpose that if when the judgment is taken in conjunction with the Information that this would clarify the issues and certainly would negative the idea that Mr. Costello was a person subject to the operations of the statutes under which he is now being tried.

Mr. Boecker: I make the same objection.

The Court: Wait a minute. I think there is some other objection to be given.

Mr. London: I will, of course, adopt the offer.

The Court: Very well.

[fol. 275] Mr. Boecker: The same objection to the offer is made, to the offer of the exhibits, and the further objection that the offer of proof is improper and defective as to form.

The Court: The objection is sustained.

Mr. Shenker: In other words, in my offer of proof you incorporate what Exhibit F is, that is a part of the offer of proof.

Mr. Boecker: It was not so made.

Mr. Shenker: Let's make it then that in my offer of proof I am reading all of this. No use wasting time reading it. I am reading the whole Information in, that is a part of my offer of proof, the exhibit and the certification, too.

Mr. Boecker: Same objection.

The Court: Sustained.

* * *

Mr. Shenker: The same ruling as to the statute?

The Court: Same objection, and same ruling.

[fol. 276] (Defendants' Exhibit F.)

State of Missouri, } ss.
County of St. Francois. }

In the Circuit Court to the November Term, A. D. 1935.

Information.

State of Missouri, Plaintiff,

vs.

George Costello and James West, Defendants. } Burglary and Larceny.

Now comes Thomas A. Mathews, Prosecuting Attorney within and for the County of St. Francois and State of Missouri, on behalf of the State of Missouri, upon his oath of office, and upon his knowledge, information and belief, informs the Court that George Costello and James West, late of the County of St. Francois and State of Missouri, on or about the 26th day of May, A. D. 1935, at and in the County of St. Francois and State of Missouri, did then and there into a certain jewelry store, shop and building, then and there occupied by and in the possession of Morris Ward, the said jewelry store, shop and building then and there located and situate in the County of St. Francois and State of Missouri, feloniously and burglariously, forcibly did break into and enter with the felonious intent then and there, thereby feloniously and burglariously to steal, take and carry away certain goods, wares and mer-

chandise, other valuable things and personal property of the said Morris Ward, in the said jewelry store, shop and building then and there being kept and deposited: Six Wrist Watches of the value of One Hundred, Forty-one Dollars and Twenty-five Cents ($141.25) and Three Diamond Rings of the value of One Hundred, Seven Dollars and Fifty Cents ($107.50), all of the aggregate value of Two Hundred, Forty-eight Dollars and Seventy-five Cents ($248.75), of the personal property of the said Morris Ward, in the said jewelry store, shop and building then and there being found, then and there feloniously and burglariously did steal, take and carry away, with the feloni-
[fol. 277] ous intent then and there to permanently deprive the owner of the use thereof, without his consent, and to convert the same to their own use; contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State.

THOMAS A: MATHEWS,
Prosecuting Attorney of St. Francois County, Mo.

State of Missouri, }
County of St. Francois. } ss.

Now comes Thomas A. Mathews, Prosecuting Attorney within and for the County of St. Francois and State of Missouri, who being by me first duly sworn, upon his oath, states that all of the facts set forth and contained in the above and foregoing information are true to the best of his knowledge, information and belief.

THOMAS A. MATHEWS,
Prosecuting Attorney of St. Francois County, Mo.

Subscribed and sworn to before me this 20 day of August, A. D. 1935.

F. P. GRAVES,
Clerk of the Circuit Court,
By MILDRED D. BROWNE,
D. C.

(Seal)

[fol. 278] State of Missouri, } ss
County of St. Francois.

I, Jesse D. Stewart, Clerk of the Circuit Court, certify the above and foregoing to be a full, true and complete copy of the information filed in the case State of Missouri v. George Costello and James West, as fully as the same remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Farmington, Missouri, this 15th day of April, 1957.

JESSE D. STEWART,
Clerk of the Circuit Court,
By PAULINE SMALLEN,
(Seal) Deputy.

[fol. 279] (The trial was then resumed before the jury, and the following occurred:)

Mr. Shenker: I would like to re-offer into evidence again, if the Court please, Defendant's Exhibit C, which was previously identified as the group of checks.

Mr. Boecker: Same objection as previously made on the previous offers of the exhibit.

The Court: Sustained.

Mr. Shenker: I also would like to re-offer, if the Court please, Defendant's Exhibit B, which was previously testified to by Mr. Cannella as being the gift which he had some years previously given to Mr. Costello.

Mr. Boecker: I will withdraw my objection to that exhibit.

The Court: Very well.

Mr. Boecker: It may be understood that part of it is broken off. It is a gold golf tee.

Mr. Shenker: That is right.

[fol. 280] Mr. Boecker: I say, it may be understood the other part of the exhibit is broken off. It is a gold replica of a golf tee.

Mr. Shenker: I have it here some place.

The Court: The jury would know more about what it was. I say, unless the jurors know a good deal more about it than the judge, they would not know.

Mr. Shenker: The inscription on it reads, if the Court please, "To my best friend, Joe Costello, from Joe Cannella."

(Defendant's Exhibit B received in evidence.)

Mr. Shenker: With the introduction of those exhibits, if the Court please, the defendant Costello rests.

(Defendant Costello rests.)

Mr. Boecker: We have rebuttal evidence.

Mr. London: We are, of course, adopting the introduction of all those exhibits; and with that defendant Cannella also rests.

(Defendant Cannella rests.)

The Court: Very well.

* * *

Government's Case in Rebuttal.

The Court: Proceed.

SISTER MARY LINUS testified as follows:

Direct Examination, by Mr. Boecker.

My name is Sister Mary Linus. I am a Sister of the Sisters of Divine Providence. I am the principal of the Ascension Catholic School. During the school year 1955 to 1956, Gary Cannella was a student at the school. He was in the fourth grade. I have brought his attendance record for February, 1956. Government's Exhibit 12 is [fol. 281] the attendance record of Gary Cannella for February, 1956. It is a record kept in the regular course of the business of operating the school. This attendance record is kept by the teacher. The attendance record is made daily.

Mr. Boecker: At this time I would like to offer into evidence Government's Exhibit 12 as being the attendance record of Gary Cannella for February 27, 1956.

The Court: Very well.

Mr. London: Of course, at this time we will object to that, incompetent, immaterial, being incompetent rebuttal as it does not relate to any issue raised in the defense.

Mr. Shenker: We further would like to add to it, if the Court please, that no foundation was laid for the introduction of rebuttal testimony of this nature.

The Court: What foundation do you want laid?

Mr. Shenker: Well, I think that there would have had to be affirmative testimony first shown as to this particular date with reference to Gary before they could introduce any evidence with reference to it. We contend that it is incompetent, irrelevant and immaterial.

Mr. Boecker: My recollection is that I did ask defendant Cannella when he appeared as a witness in his own behalf regarding his son's attendance on that date, and my recollection is——

The Court: I recall some questioning about it but I can't remember exactly what it was.

Mr. Boecker: It related to the subject matter of the testimony relating to his borrowing the car, as he stated in his testimony here, on an occasion when he said he placed a gun in Mr. Costello's automobile glove compartment, and that that was part of an excursion which involved him taking his son over to his mother's and involved his son missing at least part of the following school day, and that day would have been February 27.

The Court: I have some recollection, not too clearly in mind. The jury will doubtless remember it.

Mr. London: If your Honor please, as I recall the testimony, he said he himself did not take the boy to school. [fol. 282] There was no testimony whether the boy was or was not at school. The question was whether or not he, Mr. Cannella, took him to school on that date, the 27th, the day in question.

Mr. Boecker: My best recollection is that the question was directed to determining whether the boy was in school.

The Court: There was some question raised. The objection is overruled. The witness may answer.

Mr. Boecker: At this time I am offering the exhibit of the attendance record in evidence.

The Court: Oh, I see. The objection is overruled. You may do so.

(Government's Exhibit 12 received in evidence.)

Q. Mr. Boecker: Now, I will ask the witness what the record shows as to the attendance of Gary Cannella on the date February 27, 1956?

Mr. Shenker: May the objections that were made with reference to the exhibit go through the entire testimony, Your Honor, so it won't be necessary to repeat it?

The Court: Yes.

According to our attendance record, Gary Cannella was at school that day. According to the record he was in school all day.

Shortly after this, his father, Mr. Joseph Cannella, talked to me about his attendance record.

Q. Mr. Boecker: And what in substance did he say to you?

A. He came out to the school one afternoon after classes and he wanted to see——

Mr. Shenker: Of course, if the Court please, we will object to any conversation that this witness had with Mr. Cannella on the ground it is certainly hearsay as far as the defendant Costello is concerned, incompetent, irrelevant, immaterial to the points at issue.

Mr. Boecker: The offer is limited to defendant Cannella.

The Court: Very well.

Mr. London: As to defendant Cannella, Your Honor, of course we will object to it, being improper rebuttal relating to no issue, there is no foundation laid for this testi- [fol. 283] mony, it being irrelevant and immaterial.

The Court: The objection will be overruled. The witness may answer but the answer will be considered as binding, affecting only the defendant Cannella, and will not be binding, I think I should rule it should not be binding upon defendant Costello.

Mr. Boecker: I think that is the law, Your Honor. It would be hearsay as to Mr. Costello.

The Court: You may answer, Sister.

A. Mr. Cannella came out to the school and he wanted to see the teacher and he also wanted us—I came down as principal to Sister, to check the record, to see if the boy was present, was absent rather that day. According to our records he was not absent, and Mr. Cannella wanted us to change and to mark that the boy was absent.

Q. Mr. Boecker: Did he make any statement at that time regarding that request?

A. Yes, he did. Mr. Cannella said that it might mean that if the boy were not marked absent that date that he would have to go to prison.

Mr. London: I will object to that, Your Honor, and move that it be stricken. It is irrelevant, immaterial, placing the defendant's character in issue, no foundation having been laid, in violation of the defendant's constitutional rights.

The Court: Is that all?

Mr. London: Yes, sir.

The Court: Overruled.

Mr. Shenker: We will ask at this time, if the Court please, that the jury be instructed to disregard any statement made with reference to this witness so far as Mr. Costello is concerned, and renew our motion for a mistrial and severance.

The Court: Your motion for severance is overruled. The jury will be instructed that they regard that testimony only as against the defendant Cannella and not to be given consideration by them as far as the defendant Costello is concerned.

Cross-Examination, by Mr. London.

I don't recall the exact date that Mr. Cannella came out [fol. 284] to the school, but it was a short time after that date. The white sheet which is part of Government's Exhibit 12 is kept by the individual teacher in her classroom. I was not the teacher that kept this particular record. When Mr. Cannella came out to the school, the records were not there. The Sister in charge of the classroom had taken them home over the weekend and she went home to get them.

Q. Didn't Mr. Cannella say it was important that he find out what the marking on this sheet was, and not specifically what the marking should be?

A. No. He was quite disturbed.

Q. Let me ask you——

The Court: Sister, it is important that we hear just what he said and did, and not your impressions, but what he said, as close as you can repeat just what he said.

The Witness: Well, he asked us to think it over, if we made a mistake, to think it over, and he would call that night around seven o'clock, and which he did. He called me at the convent, and I said that we thought it over but Sister said as much as she recalled he was present; and he also said that he talked it over with his wife in the meantime, during the day, and they came to the conclusion that he was only absent a half day, that he brought him in at noon; that they were over across the river the day before and that he had a gun in the compartment of the car he had borrowed, or his boss's car, and he had a gun in the compartment of the car. He told me that.

The Court: And what else; do you remember anything else, Sister, he said?

The Witness: And he said that he forgot to take it out when he got home and they got home late, as much as I remember the boy slept and the boy was not in school, he told me that over—about his discussion with the wife, that they came to the conclusion he was only absent a half day, that he brought him in at noon, that was over the telephone, but after school when he conversed with me it was that he was absent all day, and that is when he told me about the gun in the compartment of the car.

[fol. 285] The Court: Did I understand you say he said he might be affected?

The Witness: He said if we would not reconsider that the boy was absent and have it marked that he might go to prison.

Q. Mr. London: Did he ask you to reconsider whether or not you had made a mistake; is that correct?

A. Yes, sir.

Mr. London: I have no further questions.

Mr. Shenker: I would like to ask one or two questions.

Q. Mr. Shenker: If I understand, Sister, if you please, I believe you stated, did Mr. Cannella come out to see you?

A. Yes, sir.

Q. Or did he come out to see——

Mr. Boecker: Is it my understanding Mr. Shenker is adopting this witness?

Mr. Shenker: No, I am not adopting the witness. I think in view of this I am entitled to cross-examine to remove Mr. Costello from all possible doubt in the Jury's mind.

Mr. Boecker: I object to any examination. Under the Court's instruction it did not apply——

The Court: If the jury is going to pay any attention at all to the Court's instruction they are not going to regard this against Mr. Costello, but only to Mr. Cannella.

Mr. Shenker: Very well.

The Court: And the Court will renew that charge to the jury before they are sent out to consider their verdict. See to it that that is called to my attention.

Mr. Boecker: I will, Your Honor, yes, I will indeed.

The Court: Don't overlook that. I might like to ask one question. The Court might like to ask you one question, in view of the way that counsel, Mr. London, phrased his question. Go back and read that last question as asked by one of the counsel of the Sister. Mr. London.

(Question read; answer read.)

[fol. 286] The Court: I would like to ask Sister whether * * * or not that was the way the question was phrased? I mean, when you were first, inquiry was made, I don't recall that it was phrased just like that. Did he ask you whether you had made a mistake, or did he ask you to correct the record without saying whether you had made a mistake. I would like to get that just as nearly accurately as possible.

The Witness: Well, we checked the record in his presence, and the boy was not marked absent, and he asked us to——

The Court: Now, there is where I want to be particular, I want you to try and remember his phrasing just as clearly as possible.

The Witness: He asked us to reconsider if we made a mistake, that the boy was absent all day, and we checked the records, and according to our records he was present.

The Court: And then what did he say further?

The Witness: He said we should think it over because it was very important, and that he would call me in the evening around seven o'clock, which he did.

The Court: And then when was it he mentioned what might happen to him?

The Witness: That was in the afternoon in the personal conference.

Q. Mr. London: He said you should think it over, and he would call later; he meant by that to think it over again as to whether or not a mistake had been made?

A. Yes, sir.

Q. And he also told you that he had forgotten the gun or guns in the glove compartment? A. Yes, sir.

Q. And this was just a day or so after the 27th?

The Court: She didn't say a day or so.

Q. Mr. London: Or did you——

A. I said a short time, I don't recall.

[fol. 287] The Court: She said a short time after.

Q. Mr. London: Would I be correct then in saying at sometime in the early part of March, at the latest?

A. February 27, I suppose, yes, sir, the next day was the 28th.

That would be correct?

Q. Sister, one final question. This attendance record which has been marked, which you testified is made up by the teacher of each individual classroom, is that later tabulated on a permanent record?

A. The definite sheets are tabulated.

Q. Is this information from this sheet, however, transferred?

A. Yes; the teacher marked that herself. We do not mark in the office. The teacher marks it and we file the records.

Q. But this information from the sheet is not then placed on any other sheet or any other card? A. No, sir.

* * *

[fol. 288] Mr. Boecker: At this time I would like to offer a paper which has been marked in evidence as Government Exhibit 13, with the authentication of the official seal of the Clerk of the Circuit Court of St. Charles County, and a jurat attesting to his authority and that of the judge who held the court in the case of State of Missouri against Joseph John Cannella, and showing the Information filed and the judgment entered against——

Mr. London: Before anything is stated, I would like to make my objection to it.

The Court: Let me see that.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. London: Defendant will object to this exhibit on the grounds that there has been no proper foundation laid; it is totally irrelevant, incompetent and immaterial, and it is incompetent rebuttal; that there has been nothing established in the defense of this case which would authorize the Government to at this time offer evidence of this nature in rebuttal; that there was no foundation laid for this exhibit in the cross-examination of the defendant Cannella or any other witness of the defendant.

Mr. Boecker: My recollection is I asked defendant Cannella if he had been convicted of a felony, and he replied in the negative, and I undertook to ask him further questions about this particular case, and the Court at the time stopped me.

The Court: I told you you were bound by his answer.

Mr. Boecker: But I am entitled to bring in evidence to prove his answer in the negative can be impeached.

Mr. London: Of course, on that we are objecting, along with the others, that there has been no foundation, no felony shown.

Mr. Boecker: It is a felony, in fact.

The Court: Let me see it.

Mr. Shenker: That is a fifty-dollar fine for selling liquor without a license.

The Court: The objection is overruled.

[fol. 289] Mr. Shenker: I believe his testimony was that he was working for Morris Steinbaum at the time.

Mr. London: I want to add to this, Your Honor, from the exhibit itself it shows defendant was not present at the time the conviction was imposed. There has been no foundation laid to show defendant had knowledge of any such conviction, if in fact there was a conviction as alleged by the Government.

Mr. Boecker: It speaks for itself. It says he was there in person.

Mr. London: It does not.

Mr. Shenker: I think it says in person and by attorney.

Mr. London: I glanced at it hurriedly, and I noticed it says by attorney.

Mr. Boecker: I submit it is properly identified by the Government.

The Court: Sustained. Your position is sustained.

Mr. Boecker: Is the objection overruled?

The Court: The objection is overruled.

(The trial was then resumed before the jury, and the following occurred:)

The Court: Announce an adjournment until tomorrow morning at ten o'clock.

(Whereupon at 4:31 o'clock p. m., an adjournment was taken until 10:00 o'clock the following morning, April 17, 1957.)

The Court: You may proceed with the case on trial.

* * *

Mr. Boecker: Your Honor, at this time I would like to offer a facsimile of Government Exhibit 12, which is the little boy's attendance record. The facsimile is marked Government Exhibit 12-A.

[fol. 290] The Court: Very well. You may do so.

(Government Exhibit 12-A received in evidence.)

Mr. Boecker: I also ask leave at the conclusion of the trial to withdraw Exhibit 12.

The Court: Permission is granted.

Mr. London: The record may show we have no objection to the introduction of the facsimile, but the record may show the objection which we made will apply to the facsimile.

The Court: Yes, it may.

Mr. Boecker: At this time I would like to read so much of Exhibit 13, record of Joseph John Cannella in St. Charles County as I believe to be pertinent.

The Court: Very well. You may do so.

Mr. Boecker: It bears the caption, In the Circuit Court, St. Charles County, Missouri. Be It Remembered, That on Thursday, May 10, 1945, it being in vacation of the regular term of the Circuit Court within and for the County of St. Charles, State of Missouri, the following among other proceedings were had and entered of record, to-wit: State of Missouri, versus Joseph John Cannella, No. 342. Selling Intoxicating Liquor Without License. Information, and again the caption is repeated. Robert V. Niedner, Prosecuting Attorney within and for the County of St.

Charles, in the State of Missouri, upon his official oath informs the court, that Joseph John Cannella, on the 3rd day of March, 1945, in said County of St. Charles, and State of Missouri, did unlawfully and feloniously sell a quantity of intoxicating liquor--they describe it as one highball, and states in substance it was against the law so to do; bearing the acknowledgment by the Prosecuting Attorney before the circuit court.

Thereafter, on Tuesday, May 15, 1945, it being the 2nd day of the May Term of the Circuit Court within and for the County of St. Charles, State of Missouri, the following further proceedings were had and entered of record, to-wit: again the caption of the case is repeated—and also comes the defendant herein, in person, and by his attorney, B. H. Dyer, in open court, and waives the reading of the [fol. 291] information and enters his plea of guilty to the charge of selling intoxicating liquor without a license as charged, and continuing to show that he received——

Mr. London: If the Court please, if this is going to be read I believe it should be read in its entirety without certain deletions and paraphrasing.

Mr. Boecker: Well, it is offered for the purpose of saving time. I will read the entire thing.

The Court: Very well. You may do so.

Mr. Boecker: (Reading) "Whereupon said Defendant by his attorney waives the reading of the information and enters his plea of guilty to the charge of selling intoxicating liquor without a license as charged in the information filed herein. Thereupon the Court upon the recommendation of the Prosecuting Attorney, assessed Defendant's punishment at a fine of Fifty and no/100 ($50.00) Dollars and being now asked by the Court if he had any lawful reason to give why Sentence and Judgment should not be pronounced against him, and still failing to give such cause; It is therefore Ordered, Sentenced and Adjudged by the Court, that the said Joseph J. Cannella, having entered a plea of guilty to the charge of selling intoxicating liquor without a license be and is hereby assessed a Fine of Fifty and no/100 ($50.00) Dollars, together with the costs herein incurred, which said Defendant

pays to the Sheriff and the Clerk of this Court, and he is therefore discharged."

* * *

JOE M. PEARSON testified as follows:

Direct Examination, by Mr. Boecker.

My name is Joe M. Pearson. I am a special agent, Federal Bureau of Investigation. As parts of my official [fol. 292] duties I was present at the arrest of Joseph Costello as a defendant in this case. That was on April 10, 1956. The arrest took place in the vicinity of 19th and Delmar in St. Louis. Mr. Costello was in a car at that time.

Q. Mr. Boecker: Did you participate in the search of the car and observe the search that was made of the car?

Mr. Shenker: Just a minute. I will object to that, if the Court please, on the ground that it is improper rebuttal, totally incompetent, irrelevant and immaterial to any of the points at issue involved in this case.

The Court: I don't know whether it is or not.

Mr. Boecker: It is offered in impeachment of Mr. Costello's own testimony regarding the fact that he had no other guns and also it will serve for the purpose of offering impeachment of one of the defendant's other witnesses, Mr. James, who said the gun was his.

The Court: Objection overruled.

I was there during the search and a gun was found which is now in my possession. Government's Exhibit 14 is a .38 caliber Smith & Wesson, five shot revolver bearing serial number 73953, and it was obtained from the trunk of the black Cadillac convertible being driven by Joe Costello on April 10, 1956, at the time he was arrested. Sam Guccione was in the car with him at the time.

The gun was inside a plastic type material, a small bag, and this plastic bag with the gun inside it was recovered from a black oilcloth type bag which was in the trunk of the automobile. Government's Exhibit 15 is the plastic

bag which contained the gun and which in turn was inside of another larger bag in the trunk of the automobile. The larger bag contained in addition to the gun and the bag that it was in, a while pliable material pushed down inside the black bag. I don't know what that object was.

Mr. Boecker: At this time I would like to offer Plaintiff's Exhibit 14 in evidence.

Mr. Shenker: We will object to that, if the Court [fol. 293] please, on the ground that is not contradicting anything that was testified to either by Mr. James or by Mr. Costello. It is certainly improper rebuttal and it is only offered for one purpose and that is to take the jury's minds off the real issues in the case and to unduly and unjustifiably bias and prejudice the minds of the jury.

[fol. 294] Mr. London: In addition, Your Honor, on behalf of defendant Cannella, I will ask that all this testimony be stricken and the jury instructed to disregard it, and move for a severance, and move for a mistrial at this time on behalf of defendant Cannella.

Mr. Boecker: I submit this evidence is applicable only against the defendant Costello, and for the purpose offering it as impeachment.

The Court: The jury is so instructed. You might see that you put that in my final charge to the jury.

Mr. Boecker: I will.

The Court: Overruled. Proceed.

(Plaintiff's Exhibit 14 received in evidence.)

Mr. Boecker: I offer in evidence Government's Exhibit 15, the plastic bag. May it be received?

The Court: Yes.

Mr. London: Same objection.

The Court: Same ruling.

Mr. Shenker: I am assuming my objection goes to both Exhibits 14 and 15.

The Court: It may.

Mr. Boecker: And the same limitation to both objects, limited to defendant Costello, and impeachment of witness James?

The Court: Yes.

(Government Exhibit 15 received in evidence.)

Mr. Boecker: I have no further questions.

Cross-Examination, by Mr. Shenker.

I was present while the car was searched. Mr. Costello was in the immediate vicinity of the car.

Government's Exhibit 14 was in Exhibit 15, and Exhibit 15 was in a black oilcloth type bag. It had some pliable material in it. I do not know whether that was a convertible type top or not. One end of the bag was open. I don't recall any flap. I don't know how it would be shut.

Mr. London: If I understand the ruling of the Court, [fol. 295] none of this witness's testimony goes to defendant Cannella, is that correct?

The Court: That is correct.

Mr. London: Then I will not cross-examine him.

LEONARD J. GORMAN testified as follows:

Direct Examination, by Mr. Boecker.

My name is Leonard J. Gorman. I live at 6363 Murdoch. I am in the retail toy business at Hampton Village and Northland. I have a shop at Hampton Village. I have seen the plastic bag which is Government's Exhibit 15 before. It bears our price tag on it. We have stock in our store at the present time of this description. This original stock came in February, 1955, and some of it was used during that season and some again the following season.

Q. Mr. Boecker: Now, do you know whether or not the defendant, Joseph Costello in this case, was a customer of your store at any time during those periods that you just

described, the time when this object or similar objects were on sale in 1955 and prior to April 10, 1956?

Mr. Shenker: I will object to that, if the Court please. Again that is improper rebuttal, totally incompetent, irrelevant.

The Court: Overruled.

Mr. Shenker: No foundation laid for its introduction.

The Court: Overruled. You may answer.

A. For sure, I cannot say that he was a customer during that particular time.

Q. Mr. Boecker: When was he a customer, to your recollection?

Mr. Shenker: I object. Totally incompetent; an attempt to impeach their own witness, and I think the witness has answered.

Mr. Costello has been a customer but I don't think he has been in for the last year or so that I know of.

Q. Mr. Boecker: Not for the last year but if we go back a year or so then prior to that he was a customer, is that your answer?

A. How much prior, sir, I don't know, but I say about the last year I have not seen Mr. Costello in our store.

Q. Well, a year ago would be April, 1956, is that right? [fol. 296] A. I could not narrow it down to a date.

Q. Well, within limits.

A. From memory, approximately a year, which would be April, 1956, yes.

Q. Do you recall Mrs. Costello being a customer of your store prior to the time? A. Yes, I do.

Q. Do you know of a Robert James as a customer of your store? A. No, I do not.

Mr. Boecker: That is all.

Cross-Examination, by Mr. Shenker.

We have in our store anywhere from a hundred to a thousand customers a day, depending on the season. We are open six days a week.

Robert James could be a customer in our store and I would not know him. I think I would probably know most of the customers. The store is in the Hampton Village shopping district.

Mr. Shenker: That is all.

Mr. London: Same ruling, this is not going to the defendant Cannella.

Mr. Boecker: It is submitted with that limitation.

The Court: Very well.

Mr. Boecker: No further questions.

THOMAS HALE testified as follows:

Direct Examination, by Mr. Boecker.

My name is Thomas Hale. I am a Police Lieutenant in the city of St. Louis and was a member of the St. Louis Police Department in October, 1954. During that month I had occasion to go to the residence of Joseph Costello at 2626 Gurney Court, at about five-thirty in the morning on the 29th of October. I was accompanied by Sergeant Joseph Wegman and Patrolman Richard Carroll of the Seventh District. Sergeant Wegman is now retired. Mr. Carroll is still with the force.

[fol. 297] Q. Mr. Boecker: When you got to the Costello home on that occasion did you see Mr. Costello there?

A. I did.

Mr. Shenker: I am going to object to any testimony, if the Court please, on the ground it is improper rebuttal, it does not tend to prove any of the allegations and no foundation was laid for its introduction.

Mr. Boecker: It is offered for impeachment. I submit I have laid the foundation by questions directed to Mr. Costello.

The Court: The objection is overruled. He may answer.

Q. Mr. Boecker: What, if anything, did you say to Mr. Costello upon making that call?

A. Well, I will have to enlarge a little bit. When we arrived there, Mr. Costello was in bed in a bedroom on the second floor clad in pajamas. He had a turkish towel up to his left shoulder. He was bleeding.

Q. Yes, sir.

A. And we asked Mr. Costello what had happened.

Mr. Shenker: I object to any conversation, if the Court please, on the ground it is totally incompetent, irrelevant and immaterial and improper rebuttal.

The Court: The Court can't tell. Overruled. Proceed.

A. I asked Mr. Costello what had occurred and he said he did not know. I spoke to him further and he said that he had shot himself accidentally while cleaning a gun.

Q. Mr. Boecker: What else, if anything, did you say to him?

A. I then asked him where the guns was and he said there was no gun. I said, "Well, now, you are only complicating matters. We are going to have to get the gun. If you don't give it to us we will have to look for it," so he turned to his wife who was present and said, "Show them where the gun is." So Sergeant Wegman, I don't recall who was with him, accompanied Mrs. Costello somewhere down below the second floor and Sergeant Wegman came back a few minutes later with a lady's black purse, good sized bag as I recall trimmed with brown plastic, which he handed to me, and upon opening it I found a [fol. 298] Colt .38 police positive revolver with five loaded cartridges and one spent cartridge. There was also in this bag a Smith & Wesson blue steel snub nose revolver which had five loaded cartridges, and I then asked Mrs. Costello about the gun and she said that prior to—/—

Mr. Shenker: Just a minute, if the Court please.

Mr. Boecker: That may be stricken. I think the answer is fully responsive.

The Court: It may be stricken.

Mr. Shenker: I ask at this time that the answer of this witness be stricken on the ground that it is——

The Court: Wait a minute.

Mr. Boecker: I said the portion as to what Mrs. Costello said.

The Court: That may be stricken, nothing more.

Mr. Shenker: I am moving to strike the other parts, if the Court please. I am mindful Mr. Boecker only agreed to striking one part of the conversation with Mrs. Costello. I am moving to strike the other part on the ground it is totally incompetent, irrelevant and immaterial, that it does not tend to prove or disprove any of the issues. It is an attempt to put the defendant's character at issue and raises an entirely different issue, and is improper rebuttal.

Mr. Boecker: I submit it is impeachment of the defendant.

The Court: The objection is overruled.

Government's Exhibit 16 is the Colt police positive revolver, serial number 157980, which contained five live cartridges and one spent cartridge and was found in the Costello home as I have testified.

Mr. Boecker: I offer Exhibit 16 in evidence.

Mr. Shenker: We renew our objections, if the Court please, to this exhibit offered. We certainly object to it on the ground it is incompetent, irrelevant and immaterial to points at issue; does not go to deny or affirm any of the testimony that was offered here previously by any of the witnesses, and is improper rebuttal.

The Court: Overruled.

[fol. 299] (Government Exhibit 16 received in evidence.)

Government's Exhibit 17 is a Smith & Wesson .38 Terrier bearing serial number 63851 and this is the other gun that was obtained from the Costello home on the occasion that I have mentioned.

Mr. Boecker: I would like to offer Exhibit 17 in evidence as to defendant Costello.

Mr. Shenker: Same objection, Your Honor.

The Court: Same ruling, overruled.

(Government Exhibit 17 received in evidence.)

Both Government's Exhibits 14 and 17 appear to be .38 caliber guns and would use the same ammunition interchangeably. I think any cartridge that would fit one would fit the other.

Q. Mr. Boecker: Let me ask you whether the bullets in Exhibit 7 would fit the Colt revolver, Exhibit 16?

Mr. Shenker: Same objection, Your Honor.

The Court: Same ruling. Overruled.

A. Yes, sir.

Mr. Boecker: I have no further questions of this witness.

Mr. Shenker: I move that all of this witness's testimony and the exhibits be stricken from the record, if the Court please, for the grounds previously indicated.

The Court: Overruled.

Mr. London: May my objection on behalf of Mr. Cannella go to all this testimony, and a motion for severance and mistrial be entered of record at this time?

The Court: Very well. Overruled.

Mr. Boecker: I will ask the Court to instruct the jury Lieutenant Hale's testimony and all the evidence relating thereto is offered only against defendant Costello in this case.

Mr. London: Including the exhibits?

Mr. Boecker: Including the exhibits.

The Court: The jury will be so instructed at this time, and the Court will try and instruct you again at the close of the case to the same effect.

Mr. Boecker: No further questions.

[fol. 300] Cross-Examination, by Mr. Shenker.

I did not go to get Exhibits 16 and 17. They were brought to me by Sergeant Wegman and other than his statement, I do not know where he got them. I never saw Mr. Costello in possession of Exhibits 16 or 17. When I arrived there, Mr. Costello was in bed and he was bleeding. He was taken to a hospital and marked serious and he remained at the hospital as a prisoner.

Q. Mr. Shenker: Was there a charge of possession of guns placed on him? A. At that time?

Mr. Boecker: I submit it to be beyond the scope of the direct examination.

The Court: Sustained. Objection sustained.

Q. Mr. Shenker: Well, when you said he remained a prisoner, wasn't that in connection with the shooting, isn't that correct? A. That is right.

Mr. Boecker: That part of the statement as to his being a prisoner may be stricken so far as I am concerned. I think it probably was not responsive to the question.

The Court: Very well. It is stricken. The jury is instructed to disregard it. Proceed.

[fol. 301] I did not examine Mr. Costello and I would not know if there were two bullet holes in his arm or shoulder. The guns were sent from Seventh District to the laboratory for further checking. I would not know if either of them had Mr. Costello's fingerprints on it. The report shows that the gun was not tested for fingerprints.

Mr. Costello pointed to a rag that was lying on the floor next to the bed and stated that that was the rag he used while cleaning the gun. I did not examine the rag but I think that it was picked up as evidence by other officers. I would not know if there was any cleaning material in addition to the rag found there. The report shows there was a capsule of some medication which was given to me by Mr. Costello's wife. There was a blue colored pajama top and two guns. There is nothing here to indicate there was anything pertaining to cleaning fluid or any other cleaner.

JOE M. PEARSON testified further as follows:

Cross-Examination, by Mr. Shenker.

Government's Exhibit 14 was not examined by the laboratory of the FBI to my knowledge. To my knowledge there is no indication that Mr. Costello's fingerprints were on the gun.

The Court: Will counsel step to the bench, please?

(There was a side bar conference between the Court and counsel out of the hearing of the jury and the Court Reporter, after which the following occurred:)

Mr. Shenker: If the Court please, defendant Costello rests.

Mr. London: Same announcement as to defendant Cannella, Your Honor.

The Court: Proceed.

[fol. 302] Motion of Defendant Joseph Costello for Judgment of Acquittal at the Close of the Entire Case.

(Filed in U. S. District Court on April 17, 1957.)

Comes now defendant Joseph Costello at the close of the entire case and moves the Court to withdraw the case from the jury and to enter a judgment of acquittal in his favor on each count of the indictment, and for his grounds for this motion states that the evidence adduced is insufficient to sustain a conviction against him on any of the counts thereof.

Morris A. Shenker,
Attorney for Defendant
Joseph Costello.

[fol. 303] Motion of Defendant Joseph Cannella for Judgment of Acquittal at the Close of the Entire Case.

(Filed in U. S. District Court on April 17, 1957.)

Comes now defendant Joseph Cannella at the close of the entire case and moves the Court to withdraw the case from the jury and to enter a judgment of acquittal in his favor on each count of the indictment, and for his grounds for this motion states that the evidence adduced is insufficient to sustain a conviction against him on any of the counts thereof.

Norman London,
Attorney for Defendant
Joseph Cannella.

[fol. 304] (There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

Mr. Shenker: May the record show, at the close of the entire case that the defendant Costello is refiling his request for the government to elect on which counts they will proceed, which motion was filed also, and it being the same motion that was filed at the close of the government's case.

The Court: Was it filed in writing at that time?

Mr. Shenker: Yes, sir.

Mr. London: Defendant Cannella is similarly refiling and adopting his motion to require election, which was filed by defendant Cannella at the close of the government's case.

The Court: The motion of defendant Cannella is overruled.

Mr. Shenker: May the record show then, Judge, that we refiled the same motions at the close of the entire case?

The Court: The record may show it; and each and everyone is overruled.

[fol. 304b] (Closing Arguments of Counsel to Jury.)

And Thereupon Mr. Boecker made his opening argument on behalf of the government during which the following occurred: * * *

Costello is interested in obtaining guns, and Costello has through reference of an acquaintance been referred to the very place where the guns were obtained, and I think right then and there you can draw your own conclusions about what followed. Bear in mind always that the other defendant in the case is not a man of the same stature as Costello. Cannella does what he is told, and Costello does the telling. I think that is clear, isn't it, because thereafter Costello keeps carefully out of the picture.

Mr. Shenker: May we submit, if the Court please, that that last part of the comment is certainly improper, uncalled for, and ask that the jury be instructed to disregard it. There is no evidence of it at all.

The Court: Of what?

Mr. Shenker: That Costello does the telling what to do and Cannella does what he is told to do. Now, there isn't one ounce of evidence on that.

[fol. 304c] Mr. Boecker: I submit it is a fair inference from all the evidence in the case, Your Honor.

The Court: It is within the legitimate scope of the Government's argument, I think. Overruled.

Mr. Shenker: Exception.

* * *

Thereupon Mr. Boecker concluded his opening argument.

[fol. 304d] Thereupon Mr. London made his closing argument on behalf of defendant Cannella.

Thereupon Mr. Shenker made his closing argument on behalf of defendant Costello as follows:

Mr. Shenker: May it please the Court, Mr. Boecker, Gentlemen of the Jury:

Since I recall that many of you have no previous jury experience, I might tell you that as far as the appearance of counsel or of Mr. Costello or Mr. Cannella, or any of the parties for the defendants, that this is our last final appearance. In other words, under the procedure of our system, the last argument goes to the Government. After that the only one that instructs the jury is the Court, and [fol. 304e] after that you get the case. So I certainly want to express my appreciation to you gentlemen. I am extremely sorry that we were participants in a trial which you have had to spend so much of your time on, and so much valuable time from your work. However, when you measure that compared with the real function that a citizen has, and the real benefit and privileges that you receive in discharging your responsibility as a citizen of the United States, and you have the privilege to serve on juries, I assure you that even though you had to make sacrifices, there are many places in this world where that privilege is not extended to anyone, and if it is it is only to a chosen few, certainly not to the citizens around generally, to the citizens of the community.

Now, in getting down to the things, to the analysis and final summation of this case, I want to tell you this: I have long ago discounted the idea that anything a lawyer says in his final summation is the determining factor in a jury's mind in deciding the case. You gentlemen have heard the evidence, and anything that counsel says is merely an attempt to aid you in gathering together some of the pertinent points in the case, but by the same token I am certain that when I finish and you go into your jury [fol. 304f] room, that you will think of many things which you will say, why he didn't cover this and he didn't cover that. But I don't think it is necessary for counsel to cover everything because as I say you have heard the evidence.

If you recall, when this trial began, prior to the time that you were even impaneled, before we impaneled twenty-eight and then selected twelve out of the twenty-eight, His Honor, Judge Moore, gave you the general instructions and those are considered general instructions to govern the service of jurors and the procedure in the court; and the Court told you at that time the importance of jury service, and if I can recall the Court said something to this effect, that it is the Court's responsibility to rule on all questions of law, and that if the Court was to commit error on the questions of law, that an appeal would lie, that the matter can be appealed and on the question of law, and that a higher court, an appellate court or the Supreme Court might differ from what this, His Honor thought that the law was, but that you are bound by the law as the Court gives it to you, which we subscribe to that whole-heartedly. Then the Court further said that the jury in a sense are the judges of the facts, which they are, and that an appeal [fol. 304g] from a jury verdict, an appeal from a factual finding by the jury cannot be had——

Mr. Boecker: I submit that is an improper argument, Your Honor. There is an appeal in every case, I have argued against Mr. Shenker in the Court of Appeals, he argues there is insufficient evidence to submit to the jury.

Mr. Shenker: Your Honor, Your Honor yourself gave that instruction to the jury, that there is no appeal from

a factual finding by a jury as long as there is any evidence on which they can predicate it.

Mr. Boecker: I submit that is not the law; that is an improper argument.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury, during which the following occurred:)

(Part of statement by Mr. Shenker read.)

The Court: If the jury finds him not guilty, you don't mean to say——

Mr. Shenker: There is no appeal there.

Mr. Boecker: No appeal there. I do not think that is the inference of this argument. The inference of the defend- [fol. 304lf] ant's argument, there is no appeal from a guilty verdict; the inference of the defendant's argument is that there is no appeal from a finding of guilty; and I submit that as the argument was stated, that Mr. Armbruster read, it was an incorect statement of the law. He said there is no appeal, and I say there is an appeal on the point there is insufficient evidence, from an appealable case.

The Court: Off the record.

(Discussion off the record.)

The Court: (Addressing the jury). It is the Court's duty to instruct the jury as to the law, and I think it would be much better if counsel would not attempt to assume the burden that rests upon the Court; you may go ahead now and make the statement you desire.

(The address by Mr. Shenker to the jury was resumed, and the following occurred:)

Mr. Shenker: In the final analysis, gentlemen, you are the twelve men who constitute, each of you is an independent judge of the facts in the case, and each of you, it is your duty to consider all the evidence and from the facts in the case take it, apply to the law as is given by the Court, and from that make a determination of guilt or innocence.

[fol. 304i] Now, you will find that the Court's instructions will admonish you, and I am sure Mr. Boecker will agree with that because that is the basic law, that a defendant is presumed to be innocent, that a presumption of innocence continues until or unless it has been overcome by evidence which establishes his guilt to your satisfaction and beyond a reasonable doubt, and that the burden of proving the guilt is upon the Government. Somewhere along the instruction you will certainly be told in there that there is no duty on the part of the defendant to prove innocence, that the duty and the burden rather, and the duty is to prove guilt rather than innocence.

Now, taking that into consideration, gentlemen, let's see now, has there been sufficient credible evidence that was offered here from which you can say to yourself I am satisfied, I am convinced beyond a reasonable doubt that Joe Costello is guilty of the offense that he is charged with in this indictment. And I will say to you that if you can say that to yourself, and I have implicit faith in your honesty and your integrity, and if you can say to yourself after you have analyzed all of this evidence, that you are convinced beyond a reasonable doubt of the guilt of Joe Costello in [fol. 304j] this case and the one for which he is being tried, I say to you you ought to convict him. But I further say to you, gentlemen, that you would not only have to speculate but you would have to enter into conjecture, speculation and rumors and specifications before you could come to a conclusion of that nature.

Let's take this case from its very beginning. Here is what you have: You have the testimony of the Government witnesses. Now, they are bound by it. You can't conjecture or speculate what other testimony might be. They are bound by the testimony of the witnesses that they produce here at the trial. And what did they testify to? Mr. Arnold first began to testify—oh, yes, first we got the testimony of Mr. Costello's conviction in 1936. There is no denial of that nor was there ever any denial of that. We have always contended that Mr. Costello was convicted of the offense of burglary in 1936, to be exact it is twenty-one years and two months and approximately four days, that is about how long ago it has been, but that is over twenty-one years and two months.

Now, the law under which he is charged is that a person who has been convicted of burglary cannot transport

[fol. 304k] guns in interstate commerce. Now, that is taking it all down, that is what it amounts to. Now, they say to you that Mr. Costello caused these guns to be transported.

They also say to you that Mr. Costello is a man who is the head of a big business, no denial about that, the evidence shows that he is the head of the Ace Service and Ace Cab Company—I want to ask you this, gentlemen, would he be that stupid, if nothing more, would he be that stupid that in order to make twenty bucks, and that is all there was involved in there, twenty dollars, that he would cause guns to be transported from Granite City to St. Louis, leaving everything else out of it, just taking it the way it is, that is all the evidence shows, that Mr. Klaich paid seventy dollars and that Cannella paid for the gun sixty dollars; that Mr. Price paid seventy dollars and Cannella paid for the gun sixty dollars. Now, that is a difference of twenty dollars. Now, can you conceive of Joe Costello coming in and for the sake of twenty dollars undertake to violate a law of that nature? Why, it is ridiculous.

Well, people are presumed to act for a reason. Would they say then he wanted the guns for himself? Why, their own evidence shows it was not for himself, even under [fol. 304l] their own, evidence at most there was one gun that could have been, that was in the car that he was driving, I am speaking of their evidence, not our evidence.

They introduced Klaich. They are the ones who brought out that Price had one of the guns, and that a police officer got it from Price, two legitimate perfectly proper business men.

Now, then, it is not a question that he wanted guns, aside from the fact if he wanted guns he could have got them in St. Louis, according to Mr. Arnold's testimony, but when you boil it right down where was the reason for it? Certainly there is a smoke screen put on around here. This is one of the most unusual situations you will see in your entire life. Never have I seen a case of this nature where they take an isolated situation, one place an isolated situation another place, an isolated act, there and then they try to tie them in together.

Sure, Joe Cannella knows Joe Costello. Why, do you think you would not find my associates where I am. Why,

it would be impossible for me to be associated with somebody that at one time or another he would not be at the same place, and that is what you have here. Certainly, [fol. 304m] Joe Costello was going to Illinois and Cannella wanted to go along, and he rode over there. Was that unusual, if one of your associates is in the same place where you are? Does that mean that you are partaking and participating in exactly what he does? Of course, it does not mean that. You have to speculate to reach that kind of a conclusion, and you are under your sworn duty, you are to treat Joe Costello in this case the same as any other individual, and I am sure the Court would not want you to do anything different, nor would you as independent citizens of the United States and as members of the community here in St. Louis want any man, residing in your borders when you are a juror, treat them any different than any other individual.

So, what happened? Arnold says he telephoned, that he had a telephone conversation, when somebody asked him for a gun. He said he thought that the voice was that of Joe Costello. Was there any evidence that it was Joe Costello called Mr. Arnold? Mr. Arnold testified that he thought it was Joe Costello. Now, do you think that the power of suggestion of the FBI had something to do with that? I submit to you it had a lot to do with it because it only took me one question to ask Mr. Arnold, that is all, [fol. 304n] just one question. I asked, do you know whether that was Joe Costello or Joe Cannella that called you, and he hesitated, and I said, it could have been Joe Cannella, couldn't it; and he said, yes, it could have been. Well, that is all. There is your answer there.

Mr. Earl Lewis, in spite of the opening statement of counsel for the Government, in spite of all of those statements, what did Earl Lewis testify to? Earl Lewis says Joe Costello came in there for just a minute or two, or whatever words he used, he has got that all written down. He said Joe Costello had no conversation with him at all. Now, what is wrong with that? And the minute you move away from that, what is the only other incident that you can possibly have, and that is that the automobile that was driven by Mr. Costello, which properly belongs to his wife, which he, Mr. Costello, uses often, had a gun in it. So what?

Look how many witnesses we introduced to you to prove to you that they saw Cannella put the gun in there. Do you need any more evidence than that? So I venture to say that it is fortunate it was in a public place where there were many people around and they can see it. Why, it would be most unusual normally to be able even to find [fol. 304o] people that saw that. Fortunately it was right on a business place where there were a lot of people around and they saw it; and fortunately many people knew that Joe Cannella used Joe Costello's automobile. Is there anything unusual about that?

Why, you have heard at least three witnesses testify that Mr. Costello's automobile, or the automobile used by him which belongs to his wife, is used quite often by supervisors and by office personnel. Now, those are important things, gentlemen, because I submit to you that there is not any evidence independent of those matters which connect up Mr. Costello in any manner whatsoever with the guns in question. Oh, yes, they are trying to put up a smoke screen, they are trying to convict Joe Costello for everything excepting the case for which he is being tried. And let me tell you something, gentlemen, just keep one thing in mind. Did you see where they asked Joe Cannella if he was fined fifty dollars in St. Charles on a liquor charge? I am pointing that out to you for one thing because if in the last twenty-one years and two months Joe Costello had paid a dollar fine, after he took the witness stand they would have asked him about it and would have brought it out.

[fol. 304p] Mr. Boecker: I submit it is an improper argument. The impeachment question would have to be limited to felonies, as Mr. Shenker well knows.

Mr. Shenker: That certainly is not correct, most certainly is not the law.

The Court: Step up here, gentlemen.

(There was a side bar conference between the Court and counsel, out of the hearing of the jury and out of the hearing of the Court Reporter, after which the following occurred:)

The Court: Announce a brief recess.

(A short recess was taken.)

The Court: The objection is sustained and you may proceed with your argument. The Court will rule that your statement is unwarranted because the Government would have no right to raise any question except whether this man had been convicted of a felony, so the objection of the United States Attorney is sustained; and I think you would do much better to let the Court instruct as to the law in this case, and not attempt to do it further yourself.

Mr. Shenker: How much more time have I got, Your Honor?

[fol. 304q] The Court: How much more time. You have twenty-nine minutes.

Mr. Shenker: Thank you, Your Honor, that is ample.

The fact remains, gentlemen, that if Mr. Costello during the last twenty-one years and two months, if he had been convicted of any felony and even if he paid a dollar fine or fifty-dollar fine, or ten-day sentence, whether suspended or not, the Government would have been justified in asking him, and if he denied it, to introduce evidence to refute it plus the fact if he had denied it to, if it was a fact, of course, he could be tried for perjury.

Now, gentlemen, the situation as you get down to it is simply this: they say that the Government's evidence shows that Mr. Cannella and Mr. Costello were over on the East Side. Mr. Lewis testified that Costello came in for a minute or two or three. Mr. Cannella said that Costello came in together; Mr. Costello said he waited outside, blew the horn when he did not come, went out to get him. But in either event Mr. Costello was over there. Do you think for one moment, just even for one second, that if Mr. Costello was attempting to violate the law or to procure guns, [fol. 304r] or to get guns improperly, why would he go over to Lewis's place at all? What was the point of it? If he was trying to hide something why would he go over there? It just doesn't make sense. I mean, it just doesn't make sense. Certainly you can say he did it, but that is not the way, if a man sets out to violate the law that is not the way it is done.

The thing you want to keep in mind with all of these charges for which Mr. Costello is being tried now relate

specifically and only to the transaction that was had by Mr. Cannella with Mr. Lewis. They do not relate to anything else; and I assure you that if there was a basis for a charge, and anything in connection with the time when Mr. Costello was shot in 1954, or there was a basis for a charge in connection with the gun that was in the trunk that Mr. James testified he put that in there, that charge would be lodged, and if you recall it was stipulated by Mr. Boecker yesterday when I began the questioning, whether there were any other charges pending against Mr. Costello, or any other charges were lodged against him, and he said he will stipulate that there are no other charges pending, and no other charges were lodged against him. Now, that is im- [fol. 304s] portant because that will show you conclusively, gentlemen, that in all his other conduct, of which there was testimony over here by the Government, did not amount to a suspicion of the violation or a belief that the law was being violated by Mr. Costello because if they had they would have placed a charge against him obviously. You certainly know that by now, that is what they would do with Mr. Costello. What did they do with the charges? They broke them up. You recall the indictment charges on the 22nd of December, 1955, they say that Costello and Cannella transported two guns. Now, all of it depends, all of the counts relate to the 22nd day of December excepting Count Four, which is a conspiracy, and they say that was formed on the first day of June, 1955, but the overt act which it alleges is also the transportation on the 22nd day of December, 1955. In other words, there was one transportation but they considered it that, because there are two counts in there, that they make it two transportations. In other words, Counts One and Two relate to the two guns that are in question here. There was no count filed in the Price, no charge made in the indictment at all on the Price gun, the gun that the officer got from Mr. Price, there was [fol. 304t] no charge on that at all. The only guns involved in the charge are the guns found in the car Mr. Costello was driving and on the gun that was recovered from Mr. Klaich.

Now, they alleged on the 22nd day of December, 1955 that Mr. Cannella transported the gun but, of course, they say he was the agent of Mr. Costello, that he transported that first gun, the one that Mr. Cannella had in his posses-

sion, they charge that on the same day that he transported a second gun which he gave to Mr. Klaich, and then they charge that on the same day that he turned the gun that he transported, the third count, and that is only against Mr. Costello, they say that he, Mr. Costello, received that gun after having transported it, that he received it. So you got one gun involved in three counts, and then another gun involved in the two counts. That is the way this works out. Now, all of it relates, of course, to that day, it does not relate to any other day.

Now, I want to point out to you, gentlemen, if you please, the manner in which Mr. Boecker handled Mr. Vicich. He made a great to do. Mr. Vicich, if you recall, is the gentleman who told Mr. Cannella to bring down the gun, that he was interested in a gun because he had a burglary. They made a great deal to do about it, but [fol. 304u] when we offered checks to prove that Mr. Vicich was working there Mr. Boecker objected to it and, of course, the Court sustained him; but on the other hand it just goes to show you the insincerity and the effort to pull the wool over your eyes.

Mr. Boecker: I object to that argument, after a proper ruling by the Court, an effort on the part of counsel or court to pull wool over the eyes of the jury.

Mr. Shenker: I found no fault with the Court. I said the Court properly sustained it. I am not quarreling, but certainly the Government did not have to object to it.

The Court: Read that statement.

(Statement by Mr. Shenker read.)

Mr. Shenker: That goes together with the previous statement.

(Previous statement by Mr. Shenker read.)

The Court: Do you mean it shows the insincerity of the Government and Government counsel when the Court sustained his position?

Mr. Shenker: Your Honor, you have to read that with the previous statement.

The Court: Go back and read that.

[fol. 304v] (Record read as requested.)

Mr. Shenker: It relates to the manner of the cross-examination of Mr. Vicich, Your Honor.

The Court: I suggest you be vey guarded and keep away from these border line statements. I do not like that statement made that, of course, the Court sustained him, and I do not like the statement that just shows the insincerity of the Government's counsel. I do not want to have to caution you any more. Proceed.

Mr. Shenker: The fact remains, gentlemen, that when Mr. Vicich testified every inference and innuendo was made by Mr. Boecker during the cross-examination to imply that Mr. Vicich was not working there, that he was not working at the Ace Cab Company. You recall that he made a point of saying that the FBI agents took Mr. Cannella to look at pictures to see if he could identify the driver for the Ace Cab Company that asked him to bring the gun back. You recall the way he examined Mr. Vicich. He asked him did he have his picture taken in order to drive; he made every inference during the cross-examination of Mr. Vicich to try to cast doubt on the question whether he was working for the Ace Cab Company or Ace Service Company. Now, the rest, of course, you heard the testimony and you know [fol. 304x] about Mr. Vicich.

When we introduced Mr. Duncan Davis as a witness, Mr. Cannella introduced him but, of course it is testimony that relates to both, you heard the manner of the cross-examination of Mr. Duncan Davis. Did he shake him one bit? No, he did not shake him in the least. Mr. Davis told the truth. Mr. Vicich told the truth, and it stayed that way. There wasn't any more successful effort—I say a lot of effort but no successful effort could be made to contradict any of the statements they made.

Mr. William Herman Manley, a young man, came in and testified, only twenty-eight years of age. He testified, and on cross-examination not one word was offered to contradict him, and certainly you know by now that they could have brought in any evidence they wanted if they had anything to contradict anything any of those witnesses said. They certainly went to great length to bring in evidence which Mr. Costello could not know anything about, and said he did not know, and said he told them he found out on the night he was shot, yet they brought in the guns.

Now, if they had had any evidence to contradict Mr. Manley or any of those others, they certainly would have.

[fol. 304y] Now, Mr. Boecker made a great deal to do, if you recall, about the bags Mr. Costello took home on the 26th, that is on a Sunday, until after we introduced Mr. William Laird, and when Mr. Laird came in and he tried to shake him in every way about those bags—when Mr. Boecker was questioning Robert James who took Mr. Costello home that Sunday afternoon at about two o'clock, he drove him home, and he had the bags with those envelopes in there, Mr. Boecker tried to imply, did not say it but he tried to imply that there might have been a gun in there because he asked Mr. James, he said, could there have been a gun in there, and Mr. James says all he knows was money in there, he does not know what else was in there, but after we introduced Mr. Laird and Mr. Laird came in and testified fully and in detail about those envelopes and how they handled it, and how they were accumulated during that period then Mr. Boecker, then after cross-examining him extensively, then he just dropped the subject. And we introduced Mr. Mueth. He said he will stipulate, Boecker says he will stipulate that those two bags Mr. Costello took home on Sunday had those envelopes with the money in there. Now, it is the manner [fol. 304z] in which the entire matter was handled. It is not only a question what he did with one witness, or his mannerism on anything, it is a mannerism in which he tries to take point by point; they are totally unrelated, nothing to do with it, no agreement, no understanding, and tries to shove them in together to pull the wool over —that is to create a confusion, and it is exactly the manner in which he handled everything else in this case, and you as jurors are justified, and you as practical men to take into consideration all those things and see what you make out of that, to see what you make out of it. You as jurors are justified and you should do that.

Now, we introduced Mr. Joe Stuckel. Mr. Joe Stuckel is a neighbor. You recall that he had that battery difficulty that day, and he got the battery. Now, Mr. Stuckel, gentlemen, was under subpoena, and he so testified, for the Government, and he stayed here during the entire time of this case and they did not use him, but we used him because we wanted you to know the story and we used

him, and then Mr. Stuckel's boy, we introduced him, and he told you—that is that fine looking boy, seventeen years old; and what did he tell you? He said he was there that night, that Sunday night, the Sunday night in question [fol. 304aa] when Mr. Costello's car—M . Costello said and all the evidence was Cannella had his car that night, and Joe Stuckel—I believe his name is Ted, if I recall, or Tom, anyway that young boy seventeen years old, what did he testify to. He said he took the battery home and they put it in that 1952 Cadillac belonging to Goldstein, and that Mr. Costello's automobile was not there, and there just was not any way Mr. Boecker could tell him, could get him to say that it was there.

Now, those are all factual situations. This is obvious, positive, unequivocal, definite proof that we introduced to you against the alleged suppositions, inferences and speculations that the Government expects you to indulge in in order to convict Joe Costello.

Now, let's go a little bit further on this situation. When Robert James testified about the type of bag that was in Joe Costello's car at the time Joe Costello was arrested by the FBI agent, was there one ounce of evidence offered by the FBI agents who arrested him to contradict Bob James' testimony? Not one ounce of evidence. I submit to you they said yes, there was a black bag that had what appeared to be the top or a cover of a convertible automobile. Now, don't you know, gentlemen, don't you [fol. 304bb] know—and I am sure all of you are interested in what I am going to say—don't you know that if that bag was for a Cadillac automobile instead of a Plymouth automobile that they would have so testified here? I am sure every one of you jurors got that, that if that bag had been for a Cadillac automobile instead of a Plymouth automobile they would have brought that in here and so testified. Instead all the agents said was that it was something for the top of an automobile and it was a black patent, looked like a patent leather cover, I believe he said it was black, and that's all it was. Now, you know that if that would not have been for a Plymouth automobile, the kind Mr. James operates, that would have been offered in evidence because that would have been the best evidence that it was not mixed up.

Now, they come in with a gentleman who testifies he has between a hundred and a thousand customers a day,

and they asked him whether this comes from his store. He said it did, and that he had it over a period of two years, if I recall. He said he started this merchandise in 1955 and he is still selling it. Mind you, gentlemen, a hundred to a thousand customers a day six days a week, between six hundred and six thousand customers a week over [fol. 304cc] a period of two years. Now, you figure that out yourself, and just because Mr. Joe Costello or Mrs. Joe Costello happened to be in the store buying something, he never said that they ever bought anything of this nature obviously, but buying something, that they want you to infer from that, they want you to infer from that that Mr. Costello had something to do with the gun that was found in the back of that car.

Now, I want to show you something—I mean just keep in mind—to what extent, how they ask you to speculate, just keep in mind a hundred to a thousand customers a day six days a week over a period of two years. That would have been the case; and he said because Mr. or Mrs. Costello had been to the store there before, bought some merchandise, never saying they bought anything of this nature, that therefore they want you to infer that that was in there. If they want to be, really be fair, did they come in and tell you that that bag was not for a Plymouth automobile or was for a Plymouth automobile, one way or the other? They did not. Do you know what the difficulty is, gentlemen. You see, it is a one-way streetcar with those fellows, it is strictly a one-way streetcar with those fellows, they take what they want. It is like the [fol. 304dd] fingerprint deal. Do you mean to tell me that you jurors could conceivably believe that they did not test each and every one of those guns for fingerprints? Do you mean to tell me that you could believe that? I would say it is an insult to your intelligence to expect a jury to believe that they did not test those guns for fingerprints. Of course, they tested them for fingerprints. They had to. They sent them to their laboratory to test for everything. The fact remains that there is not a scintilla of evidence to show that Joe Costello's fingerprint was on any of those guns. That is important because the gun was found in a car that he was driving

Now, about those car keys. What is the evidence on those car keys. The evidence on the car keys, according

to the police officers is this, that the very keys that Mr. Costello had on his person at the time when he was arrested—now, this is important—were used to open the glove compartment two hours later at the police station. Now, obviously they had to manipulate the key otherwise they would have opened it when he was stopped. They had the same keys, they said they had the same keys: Why [fol. 304ee] didn't they open it at that time? Obviously it was a different key that fitted it and certainly the gentleman that testified from the Lindburg Cadillac Company said that those keys, that a compartment could be opened with many other keys, and the testimony was brought out by a Government witness, not by us, that it can be opened with another key and, of course, the inference is that they manipulated one of the keys that they had and it was finally opened, but that does not prove that Mr. Costello had the key to the glove compartment in his possession, because if he had it the glove compartment, it would have opened it easy, and they would have opened it right at the scene, right when they stopped him and when they asked for the glove compartment key. Obviously they tried everything. Now, I am pointing those things out to you because those are things that a jury in considering a case, particularly of this nature, must be cognizant of, because they are just trying to take unconnected instances and trying to get enough to give the case to the jury, that is all, period.

I want to tell you this, gentlemen. The Court is going to instruct you on circumstantial evidence. Now, there isn't anything wrong with circumstantial evidence. It is [fol. 304ff] perfectly good evidence but I beg of you listen to that instruction carefully. Listen to that instruction carefully. I saw that instruction. That instruction is going to give you the law on circumstantial evidence. That has been universal, and you will find that His Honor, Judge Moore will tell you that before you can convict on circumstantial evidence that there must, all of the facts and circumstances must be fitting in so close that there can be no other reasonable conclusion to be reached but that of guilt. If all the facts and circumstances can also spell out innocence, then it is not just a prerogative of yours but it is your duty to find not guilty. So, gentlemen, just pay strict attention to that law on circumstantial evidence, because

you are supreme, gentlemen, as far as the facts of the case are concerned. You are absolutely supreme as far as the facts of the case are concerned, just like His Honor, Judge Moore is supreme on the law you are supreme on the facts. When you go into that jury room you are going to fulfill the highest honor that can be fulfilled by any American citizen, and that is to render jury service. You are supposed to go in, and I am sure you will, free from any prejudice or from any bias, independent of mind and thought, fearless if you please; and to do your duty, and [fol. 304gg] your duty is to decide the case wholly on the evidence that has been presented here and nothing else.

The Court: You have five minutes remaining.

Mr. Shenker: Thank you, Your Honor.

I want to point out to you, gentlemen, as I said at the outset, it is impossible nor will there be an attempt made, nor could I cover every little incident in this situation, but just remember the facts of this case. Remember that Mr. Lewis said that he did not talk to Cannella about guns at all, remember that Mr. Lewis said he did all of his business—rather that he did not talk to Costello about guns, remember that Mr. Lewis said all of his dealings were with Joe Cannella, remember that Mr. Lewis said that at no time, that he only saw Joe Costello one time, was only there a short period, that he said nothing to him and he said nothing to him. Remember Mr. Arnold first, he said on the telephone calls that it might have been, he said it was Costello, he said it could have been Cannella or Costello, he did not know which. When you keep all those things in mind, keeping in mind there would have been no reason for Joe Costello to do any of the things which they say that he did, keeping all of those things in mind, [fol. 304hh] gentlemen, and keeping your sworn duty as jurors to act independently and to act strictly on the facts, on the evidence which was introduced here, you can be guided by the Court's instruction on the law. I submit to you, gentlemen, if you conduct yourselves in that manner, which I am sure you will, I am very confident of the outcome of this case. I feel confident, gentlemen, that if you conduct yourselves in that manner, and I know that you will, that each and every one of you, and it is necessary that each and every one of you act, in other words

this is not something where the majority rules or the largest number, or nine to three, this necessitates a unanimous verdict, and while it is the duty of each juror to freely discuss the facts and circumstances and to discuss the case with the other jurors in the jury room, it is equally the duty of each juror, the sworn duty, if you please, to only vote the way he himself finally believes, and not to accept anything of anybody else; and by the same point it is the duty of each juror, even though to discuss everything, not to attempt to superimpose improperly his feelings or his beliefs on another juror; and I know if you do that, gentlemen, I know if you do that and conduct your-
[fol. 304ii] selves in that manner, I have every faith and confidence that you will—this was not the kind of a case where we took any juror that was available, I assure you we selected the best jury we thought was available out of the panel, not that the others were not qualified but we certainly wanted to get a jury that would fully understand all the issues in the case, and I think we have such a jury—and I assure you when you do all of that you will come back with a verdict of not guilty. Thank you very much.

Thank you, Your Honor.

Thereupon Mr. Boecker made his closing argument on behalf of the government.

[fol. 305] On April 17, 1957, the Court charged the jury as follows:

Court's Charge to the Jury.

The Court: Gentlemen of the Jury: It now becomes the duty of the Court to give you the law which ought to govern you in your deliberations on your verdict in this case, and under your oaths of office you are bound by the law as the Court shall declare it to you; and if I shall err in declaring that law it is not your fault but mine; the blame for such error rests upon my shoulders and not upon yours.

It has been and will be the Court's purpose in this case to express no opinion upon the facts, for that is your province, and the Court does not propose, even if it had the power to do so, to influence your judgment on the

facts to even the slightest degree. Therefore, if during this trial you have imagined or gained the impression that the Court had any opinion in regard to this case, so far as the facts are concerned, dismiss that impression from your minds, because the Court meant to express, neither by manner nor by voice, any opinion on the facts. If it should seem to you at any time during this charge that the Court has an opinion respecting what may or may not be a fact, you should still remember that the Court's conclusion is in no sense to weigh upon you or control you in your finding and determination of what the facts are in this case.

The indictment was read to you at the commencement of this trial. This indictment constitutes no evidence whatsoever of defendants' guilt, and it is not to be considered by you in that connection whatever. The indictment is [fol. 306] merely the formal charge by which a criminal case, such as this, is brought into Court. Its sole function is to identify the offense with which the defendants are here charged.

If you find from the evidence in the case and beyond a reasonable doubt that defendant Joseph John Cannella obtained the gun mentioned in Count I of the indictment, in Granite City, Illinois, and transported it to St. Louis, Missouri, and if you further find from the evidence and beyond a reasonable doubt that he so transported it at the request and direction of defendant Joseph Costello, then defendant Costello caused said gun to be transported in interstate commerce within the meaning of the language of the statute on which the charge in Count I is based, and if you further find from the evidence and beyond a reasonable doubt that Defendant Costello had, prior to said transportation of said gun, been convicted of the crime of burglary in the State of Missouri as charged in said count, then you should find defendant Costello guilty of the charge stated against him in Count I of the indictment.

If, and only if, you find defendant Costello guilty under Count I pursuant to these instructions, you should consider the charge against defendant Cannella in Count I. It is the law that whoever aids, abets, counsels, commands, induces or procures the commission of a crime is guilty as a principal offender. If you find from the evidence and beyond a reasonable doubt that defendant Cannella knew

that defendant Costello had been convicted of burglary as charged in the indictment and that defendant Cannella obtained the gun mentioned in Count I in Granite City, Illinois, and, at the request and direction of defendant Costello, transported that gun to St. Louis, Missouri, then I charge you that defendant Cannella aided and abetted the commission of the offense by defendant Costello, if you find that defendant Costello did commit the offense, and you should find defendant Cannella guilty of the charge stated against him in Count I of the indictment.

As to the charge against defendant Costello in Count II of the indictment, if you find from the evidence and beyond a reasonable doubt that defendant Cannella obtained [fol. 307] the gun mentioned in Count II in Granite City, Illinois, and transported said gun to St. Louis, Missouri, and if you further find from the evidence and beyond a reasonable doubt that he so transported it at the request and direction of defendant Costello, then defendant Costello caused said gun to be transported in interstate commerce within the meaning of the language of the statute on which the charge in Count II is based, and if you further find from the evidence and beyond a reasonable doubt that defendant Costello had, prior to the said transportation of said gun, been convicted of the crime of burglary in the State of Missouri as charged in the indictment, then you should find defendant Costello guilty of the charge stated against him in Count II.

If, and only if, you find defendant Costello guilty under Count II pursuant to these instructions, you should consider the charge against defendant Cannella in Count II. I have already instructed you that he who aids and abets the commission of a crime is held as a principal thereto. If you find from the evidence and beyond a reasonable doubt that defendant Cannella knew that defendant Costello had been convicted of burglary as charged in the indictment and that defendant Cannella obtained the gun mentioned in Count II in Granite City, Illinois and, at the request and direction of defendant Costello transported that gun to St. Louis, Missouri, then I charge you that defendant Cannella aided and abetted the commission of the crime charged in Count II, if you find that defendant Costello committed the crime, and you should find defendant Cannella guilty of the charge stated against him in Count II of the indictment.

As to the charge against defendant Costello stated in Count III of the indictment, if you find from the evidence and beyond a reasonable doubt that defendant Costello had been convicted of the crime of burglary in the State of Missouri as charged in said Count and if you further find from the evidence and beyond a reasonable doubt that defendant Costello received the gun mentioned in Count III upon its transportation to St. Louis, Missouri, from Granite City, Illinois, and if you further find from the evidence and beyond a reasonable doubt that defendant Costello knew it had been so transported incidental to his [fol. 308] receiving of said gun, then I charge you that defendant Costello has received a firearm which has been transported in interstate commerce within the meaning of the statute on which the charge in Count III is based, and you should find defendant Costello guilty of the charge stated against him in Count III.

As to the charge stated against both defendants in Count IV of the indictment, it is necessary that before you can find either defendant guilty you must find both defendants guilty to the charge in Count IV from the evidence in this case and beyond a reasonable doubt, since the charge in the fourth count is one of conspiracy and a conspiracy requires two or more persons to commit the offense. If you find from the evidence and beyond a reasonable doubt that the defendants Costello and Cannella conspired together to cause guns, that is, certain Smith and Wesson .38 caliber Chief Special revolvers, to be transported in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, and to have defendant Costello receive a firearm of said description which had been transported in interstate commerce between said cities, defendant Costello having prior to said conspiracy, transportation and receipt, if any, been convicted of the crime of burglary as charged in Count IV and the fact of such conviction, if any, being known to both defendants, and if you further find from the evidence and beyond a reasonable doubt that to effect the object of said conspiracy, if any, defendant Cannella obtained the guns mentioned in Count IV of the indictment from one Earl Lewis at Granite City, Illinois, then you should find both defendants guilty of the charge stated against them in Count IV of the indictment.

I ought at this time to undertake to tell you the legal significance of the term conspiracy as used in this Statute, and as pertinent in this prosecution. A conspiracy simply means a combination or understanding between two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose, by unlawful means. There must, in any event, be at least two persons involved. There may be any number greater than two, but there must always be at least two; because, obviously, an individual could not conspire with himself. The term means a con- [fol. 309] federating or agreeing together, so if two or more parties confederate or agree or have a common understanding for the accomplishment of an unlawful purpose, to commit any offense against the United States, then those persons are what the Statute denominates as conspirators.

Now, I caution you that it is not necessary, in order to constitute a conspiracy, that two or more persons should actually meet together—that is personally be together—and then enter into an explicit or formal agreement for an unlawful or criminal scheme; nor is it necessary before a conspiracy can be formed that two or more persons shall directly, that is expressly, by writing or by spoken words, state or agree as to what that unlawful or criminal scheme is to be, or the particulars of the plans, or the means to be applied in carrying out such a conspiracy. Conspiracies are seldom, indeed, formed in a manner open to such direct proof. Conspirators do not go out upon the public highways and proclaim their purpose. It is enough that they have a common purpose, and that they act together for that purpose. As I have told you, it is not necessary that a formal agreement be proved. It is sufficient if the testimony shows that the parties are acting together understandingly to accomplish the same unlawful purpose.

You may, in determining whether or not a conspiracy exists, take into consideration all of the facts and deeds and surrounding circumstances admitted in evidence, and from that determine if the evidence, in your judgment, so warrants that a conspiracy has been formed within the meaning of the statute.

The mere formation of the conspiracy, the mere entering into an unlawful agreement, does not constitute the offense that you are to consider here in this case. A conspiracy

only comes under the ban of the law when some one or more of the overt acts have been performed. After the unlawful agreement has been formed, if you think one has been formed in this case, one or the other of the parties to it must do some one of the acts—it does not matter which one—but at least one of the acts must be performed with the intent and purpose of carrying into effect the conspiracy. Neither does it matter nor is it of any consequence, after a conspiracy has been formed and entered into, by which party the overt act is performed. Now, if you believe in the case before you that the defendants, [fol. 310] acting with a common purpose, agreed to commit an offense against the United States, and that after so agreeing, the defendants did some one or more of the alleged overt acts to carry that conspiracy into effect, then each of the parties are equally guilty.

A conspiracy might be defined as a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner. Now, the essence of the offense is the conspiracy itself, but the mere forming of the conspiracy is not enough within itself to come within the terms of the Statute. At least two things are necessary; first, the unlawful conspiracy must come into existence, and, secondly, some one or more of the parties to that conspiracy must do some act to effect the object of the conspiracy. The indictment herein charges the doing of overt acts, in order to effect the object of the conspiracy, as set forth in the indictment.

Defendant Costello denies each and every one of the charges contained in each and every one of the counts in the indictment. He admits, however, that he was convicted of the crime of burglary in the second degree. As I understand it, it is his position that he did not transport, receive, or ship in interstate commerce firearms or conspire so to do, or cause their shipment; that he loaned the use of his wife's automobile to defendant Cannella; that he did not know that Cannella had placed firearms in the glove compartment of his automobile; and that he had no knowledge in nor did he participate in the transportation or shipment of firearms in interstate commerce.

Defendant Cannella denies each and every one of the charges contained in each and every one of the counts in the indictment. As I understand it, it is his position that

he transported the firearms in interstate commerce, without knowledge or participation of defendant Costello; that he did sell two of the firearms and retained one for himself; that he borrowed the automobile owned by Costello's wife on February 26, 1956, to impress his friends; that he placed the firearms in the glove compartment of the borrowed automobile; and that he forgot to remove these items from the automobile, and that he did not inform Costello of same until after Costello's arrest on February 27, 1956.

The Court instructs the jury that the law clothes the defendants with the presumption of innocence, which [fol. 311] attends and protects them until it is overcome by evidence which proves their guilt beyond a reasonable doubt, which means that the evidence of his guilt, as charged, must be clear, positive, and abiding, and fully satisfying the minds and consciences of the jury. It is not sufficient in a criminal case to justify a verdict of guilty that there may be strong suspicions or even strong probabilities of guilt, but the law requires proof by legal and credible evidence, of such nature that, when it is all considered, it produces a clear, undoubting and entirely satisfactory conviction of defendants' guilt; and the burden of establishing the guilt of the defendants, as above referred, is upon the prosecution. This much is required by law. If this much has not been proven, you will find the defendants not guilty.

You are instructed that each of the charges against each defendant in this case must be proved beyond a reasonable doubt. The burden of proof to that degree is upon the United States and that burden never shifts and there is no obligation on the part of the defendants to prove their innocence.

The term reasonable doubt as used here means a doubt based upon reason and arising out of evidence or lack of evidence relating to the particular issue under consideration. A reasonable doubt is such doubt as leaves a juror's mind so undecided that he does not have an abiding conviction of the defendant's guilt after full and fair consideration of the evidence, that is, such a doubt as would cause a reasonable, thoughtful and prudent person to act or refrain from action in an important matter in his own affairs. However, a reasonable doubt does not arise from

mere conjecture, speculation or whim nor from any reluctance to convict based on sympathy or mercy.

The assessment of punishment is the function of the Court and you need not concern yourself with that. Your duty is performed when you have found upon the question of the guilt or innocence of the defendants.

In weighing the evidence in the case and considering the credibility of witnesses who have appeared in this case, you are to apply such tests as your own good judgment and sound common sense call for and in this connection you may consider a witness's demeanor on the stand, how [fol. 312] he answers questions, his readiness or lack of readiness to answer, to speak up and be heard, as well as the relationship, if any, of the witness to any of the parties in the case, any bias or feeling that you infer or find that he has about the case. You may also consider whether the witness has had an opportunity of knowing the things which he professes to as facts and you may consider whether the testimony given is reasonable or unreasonable, probable or improbable in the light of your own good judgment and sound common sense and experience in life and the instructions given you in this case.

Cross-examination has been undertaken and evidence has been introduced for the purpose of impeaching the testimony of various witnesses. A witness may be impeached by showing that he has been convicted of a felony, by showing that he has made prior statements contradictory to and inconsistent with the testimony given in court concerning matters material or relevant to the issues. If you find from the evidence that the credibility of a witness has been impeached, you are at liberty to disregard the entire testimony of that witness, unless such testimony has been corroborated by other evidence. If you find that any witness has willfully testified falsely to any material fact in this case, then you must disregard that testimony that you find to be false and you may disregard any or all of the testimony of that witness. On the other hand, you may accept such portion of the testimony of such witness who has been impeached or who has knowingly testified falsely as you believe to be true and credible.

If you find that either of the defendants made statements to investigating officers contrary to the proven facts, and did so wilfully and with knowledge of the falsity,

you are at liberty to consider that circumstance as evidence of that defendant's guilty conscience, regarding the matter under inquiry. Such circumstance should be considered only if the falsehood related to a matter pertinent to the inquiry, and as to what is pertinent, you are to be guided by the evidence which this Court has permitted to be introduced in this case.

The intent of the defendant is an issue in each charge of the indictment, and intent cannot be shown except by inference from facts and circumstances shown in evidence. Such facts and circumstances include what is known as circumstantial evidence.

[fol. 313] Circumstantial evidence is legal evidence. A jury must act upon circumstantial evidence the same as if it were direct evidence when it is satisfied by such evidence beyond a reasonable doubt.

The weight to be given to circumstantial evidence can be stated very simply and the rule is this: To the extent that the Government's proof in this case is circumstantial, those circumstances relied upon to convict must be consistent with guilt alone and not consistent with innocence or the balanced hypothesis of either guilt or innocence.

In order to justify a jury in finding a verdict of guilty based entirely or substantially or circumstantial evidence, the facts sought to be established by circumstantial evidence must not only be consistent with the guilt of a defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence.

Under the law the guilt of the defendants or either of the defendants of the charges set forth in the indictment may be established by circumstantial evidence. Whether it has been or not is for you to determine.

During the course of the trial the Court admitted certain evidence as applicable to only one of the defendants. When such evidence of limited application was received in the case, I admonished you to consider it only in connection with the charges against the defendant to whom such evidence applied, and not to give such evidence any consideration in connection with the charges against the other defendant, and I again admonish you to so restrict your consideration of such evidence whose application is limited to one defendant only. This rule is binding on

you even though the other defendant may have been mentioned in such evidence.

The Court allowed the government to cross-examine witnesses presented by the Government. The Court allowed the Government to inquire of these witnesses whether or not they had not made statements contradictory of their testimony during this trial at other times including statements in the office of the United States Attorney, before the United States Grand Jury and before agents of the Federal Bureau of Investigation. The statements of these witnesses made at other times than during the trial must not be considered by you as evidence of the guilt or in [fol. 314] nocence of defendants. In other words, these statements cannot be considered as evidence of the alleged facts recited in them. These statements, outside the courtroom, were admissible for the purpose of cross-examination and to explain why the Government had called them as witnesses.

Evidence has been introduced that Joseph John Cannella has a prior conviction for violation of the liquor laws of the State of Missouri.

In this respect, I charge you as a matter of law that this conviction is not a crime of violence within the meaning of the Federal Firearms Act and should not be considered by you in determining the guilt or innocence of defendants, but may only be considered for the purpose of determining the credibility of Cannella as a witness.

Evidence has been introduced that defendant Costello has had a prior conviction of the offense of burglary. Evidence of this prior conviction may only be considered by you as bearing on the element of the prior conviction required for the crime charged. It should not be considered by you for any other purpose in determining his guilt of the offense charged.

The Court allowed the Government to introduce into evidence certain statements alleged to have been made by defendant Cannella to agents of the Federal Bureau of Investigation. These statements are not to be considered by you as evidence against defendant Costello. His guilt or innocence of the crime charged must be determined by you apart from these statements. The jury is charged that it must not permit these statements to weigh in the

slightest degree against defendant Costello, nor should these statements enter in the discussions or deliberations of the jury in any manner in regard to defendant Costello.

Mere possession of firearms does not indicate that their acquisition must have been in an interstate transaction.

The mere possession of firearms by any person who has been convicted of a crime of violence does not create a presumption that the firearms were shipped or transported or received by such person in violation of the Federal Firearms Act.

A firearm shipped in interstate commerce ceases to be-[fol. 315] come the subject of interstate commerce when it has come to rest within the borders of the state into which it is shipped.

Even if you find that firearms were transported and shipped in interstate commerce by defendant Cannella, it is still your duty and you must acquit defendants unless you further find that defendant Costello received such firearms and that his reception of such firearms was in some way connected with interstate commerce.

Evidence has been introduced that defendant Costello has been formerly convicted of the crime of burglary. The issues as to whether or not he received, transported or shipped firearms in interstate commerce or conspired so to do should be considered by you solely and only upon the other evidence which is introduced before you at trial pertaining to those issues. The fact of a former conviction should be considered by the jury only as bearing upon the issue as to whether or not he has been convicted of a crime of violence within the meaning of the statute and for no other purpose. The fact of a former conviction should not be considered by you on the issues as to whether he received, transported or shipped firearms in interstate commerce or conspired so to do.

I have caused to be prepared for you two forms of verdict. You will use the forms that I submit to you whether you find the defendants guilty or not guilty. You must make a finding upon Counts One, Two, Three and Four as to defendant Joseph Costello, and upon Counts One, Two and Four as to defendant Joseph John Cannella, as you may find and believe the facts to be from the law and the evidence.

You may find defendant Joseph Costello, guilty on all four counts or not guilty on all four counts, or guilty on one or more counts and not guilty on the others, as you may find and believe the facts to be from the law and the evidence.

You may find defendant Joseph John Cannella guilty on Counts One, Two and Four or not guilty on Counts One, Two and Four, or guilty on one or more of such counts and not guilty on the others, as you may find and believe the facts to be from the law and the evidence.

In any count other than Count Four charging more than one person you may find one of the persons named guilty [fol. 316] and the other not guilty, or you may find one of the persons named not guilty and the other guilty, as you may find and believe the facts to be from the law and the evidence. Your finding on Count Four should be either that both defendants are guilty or both defendants are not guilty, since Count Four charges a conspiracy.

When you have unanimously agreed upon a verdict, one of your number will sign it as foreman and return it into court.

Exceptions to Court's Charge to the Jury.

The Court: Has the government any further suggestions or exceptions?

Mr. Boecker: We have none, Your Honor. We are satisfied with the charge as given.

The Court: Have either of the defendants any further suggestions or exceptions?

Mr. Glazer: Defendant Costello objects to the Court's charge in the following respects. He objects to the Court telling the jury that if, and only if you find defendant guilty under Count I pursuant to these instructions you should consider the charge against Cannella in Count I; and also to the charge of the Court where the Court said if, and only if you find defendant Costello guilty under Count II pursuant to these instructions you should consider the charge against defendant Cannella in Count II, for the reason that certain evidence in this case was admissible only against defendant Cannella, particularly the

evidence relative to his statements to Federal Bureau of Investigation Agent Moss, and that evidence was admissible only against Cannella alone and that this part of the instruction has an implication that the jury could find Cannella guilty only if they find Costello guilty, whereas it allows the jury perhaps to consider this inadmissible evidence against Costello, and the jury could possibly find under the evidence that Cannella was guilty taking into consideration the evidence of his statement to Federal Bureau Agent Moss and using that additional evidence finding Cannella guilty and not finding Costello guilty.

Defendant Costello further objects to the instruction for the reason that the Court should not have instructed the [fol. 317] jury they could find the defendant guilty both of the conspiracy and substantive counts in this indictment, and that the Court should have allowed the jury to either find defendant Costello guilty of either the conspiracy or the substantive counts but not both because of the nature of this crime being a crime that defendant Cannella could not commit by himself.

The defendant Costello further objects to the Court allowing the jury to convict Costello on Counts I, II, III, for the reason that those counts only, the evidence under those counts only was one offense and not three offenses.

In regard to the Court's hypothesizing the facts as to each of the four counts, beginning with the Court instructing the jury that if you find from the evidence in this case and beyond a reasonable doubt that defendant Cannella obtained the gun mentioned, etc., and the Court goes on and hypothesizes the facts above for all four of the counts, defendant Costello objects to that on the grounds that in Federal Court the Court should not hypothesize the facts because this interferes with the finding, with the function of the jury of applying the law to the facts.

In regard to the hypothesis relative to Count III in which the Court charges the jury as to the charge against defendant Costello as stated in Count III, if you find from the evidence defendant Costello had been convicted of the crime of burglary and that Costello received the gun mentioned, and the gun had been so transported incidental to his receiving the said gun, defendant Costello objects to

that portion of the charge for the reason that that itself is insufficient to constitute the offense of receiving a gun by a person with a prior conviction of a crime of violence.

Insofar as the Court hypothesizes the facts relative to Count IV of the indictment and allowed the jury to convict the defendants if they further found from the evidence that defendant Cannella obtained the gun mentioned in Count IV of the indictment from one Earl Lewis at Granite City, Illinois, defendant Costello objects on the ground that that is not a sufficient overt act in law to constitute the crime of conspiracy under the Federal Fire Arms Act.

[fol. 318] Mr. Shenker: Just one thing I wanted to add to it, if the Court please, that the instruction wherein the Court, defendant excepts to the instruction in which the Court stated that a witness may be impeached by showing that he has been convicted of a felony, and we contend that that is not, that is an improper admonition to the jury in this situation, and also on the instruction wherein there is comment by the Court that statements made by defendants to investigating officers, that they can be used, that they can be considered by the jury insofar as if the statements were false as an admission of guilt on their part.

The Court: Well, I don't think that you correctly——

Mr. Shenker: I am saying only the part, I mean I am not quoting it verbatim the way the Court said.

The Court: But I don't believe you got the spirit of the instruction.

Mr. Shenker: It is that instruction which Mr. Boecker submitted and which states the jury may consider any contradictory statement that he, a witness has made to investigating officers. Isn't that the way you worded it?

Mr. Boecker: I think what the instruction says in substance is that they must find that one of the defendants wilfully and knowingly made a false statement about a matter pertinent to the inquiry, and if they so find, it would indicate a guilty conscience regarding the matter under inquiry.

Mr. Shenker: I just got the instruction, Your Honor.

Mr. Boecker: And then it defines what the Court means by pertinence.

Mr. Shenker: This exception goes to the instruction which defines that if you find that either of the defendants made statements to investigating officers contrary to the proven facts, and that was wilfull, and with knowledge of the falsity, you are at liberty to consider that circumstance as evidence of the defendant's guilty conscience regarding the matter under inquiry. Then the instruction goes on that such circumstances should be considered only if the fals hood related to a matter pertinent to the inquiry, and as to what is pertinent you are to be guided by the evidence which the Court has permitted to be introduced in this case.

[fol. 319] The Court: Very well.

Mr. Shenker: Thank you. On the previous objection which I made to the part wherein the Court stated that a witness may be impeached by showing that he has been convicted of a felony, of course we are excepting to that because that should not impeach him, it should only go to his credibility.

Mr. London: If the Court please, I would like the record to show that as to defendant Cannella we adopt the exceptions made as to defendant Costello, those, of course, which are applicable to defendant Cannella, by leave of court, rather than go through those we would adopt them.

The Court: That may be done.

Mr. London: In addition to that, on behalf of defendant Cannella we will except to the Court's charge, of the several times the Court mentioned alleged conviction of defendant Cannella; it was mentioned on numerous occasions and, therefore, gave undue weight by that statement to the attention of the jury. We except to the charge that both defendants under Count IV must be found guilty or both defendants under Count IV must be found not guilty.

The Court: Isn't that correct?

Mr. London: No. The indictment charges, conspired with each other and with other divers parties unknown.

The Court: There is not one word in regard to any unnamed party.

Mr. London: We will except for defendant Cannella, the Court should not have authorized the jury to consider his guilt or innocence as to Counts I and II and IV, in this, defendant Cannella never having been convicted of a crime of violence could not be convicted under the Federal Fire Arms Act, or unless he worked or conspired with a person who had been so convicted and, therefore, the substantive counts and conspiracy counts as to defendant Cannella are one and the same, and the Court should have, therefore, instructed the jury that they should limit themselves either to Count I and II or to Count IV.

[fol. 320] The Court: If he knew defendant Costello had been convicted for a crime of violence that was sufficient.

Mr. London: Our position, Your Honor, is that it is either a substantive count or conspiracy, they are the same as to defendant Cannella, the same evidence would prove both.

The Court: Is that all?

Mr. Shenker: That is all, Your Honor.

Mr. London: That is all.

The jury retires to consider its verdict.

At 4:30 o'clock p. m. the jury retired to consider its verdict.

The jury returns to the courtroom.

At 7:02 o'clock p. m. the jury returned to the courtroom, and the following proceedings were had:

The Court: I take it you have not arrived at a verdict yet, you have not arrived at a verdict?

A Juror: We have not, sir.

The Court: I want you to be careful, don't volunteer anything more than just what I ask you. Confine your answers—you are the foreman?

A Juror: Yes, sir.

The Court: Confine your answers very closely to a response to my question. Have you reached the point that you have any doubt about the jury being able to arrive at a verdict? I don't want you to tell me about how you are divided or that sort of thing. Are you hopeful that a verdict can be arrived at?

The Foreman: I don't think we could answer that right away.

The Court: Very well. Do I understand you would like to eat? You can answer that one.

The Foreman: Well, I think that is correct.

[fol. 321] The Court: Very well. I think before I direct the Marshal to take you out, I think I will give you a charge now and save doing it later.

I want to call your attention to the fact that this is an important case and the trial has been rather long. It began Monday morning a week ago. Should you fail to agree upon a verdict it will necessitate another trial equally as expensive. This has been an expensive trial. The Court is of the opinion that this case has been exceptionally well tried and it can't be tried any better, or more exhaustively than it has been on either side. It is, therefore, very desirable that you should agree upon a verdict.

In a large proportion of cases, and perhaps strictly speaking in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not mere acquiescence in the views of his fellows, yet in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, the same source from which any future jury must be, and there is no reason to suppose the case will ever be submitted to twelve men more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other; and with this in view it is your duty to decide the case if you conscientiously can do so.

I am saying this to you now so as to save time later. I am going to direct the United States Marshal to take you out to dinner and bring you back to the jury room and to resume your deliberations.

(Omar Schnatmeier, United States Marshal, and James A. Ried, Bailiff, were duly sworn on their oaths to keep the jury together.)

[fol. 322] The Court: Mr. Marshal, I want to say this to you, their families may be surprised—I want you to take these men, before you take them to dinner, take them over to your own office and let them call their families, or you call them for them, and advise them what the situation is and why they are detained here. Then take them to some hotel or restaurant and bring them back after their dinner to the jury room. Is there anything you can think of at this time; any other suggestion from counsel?

Mr. Shenker: No, Your Honor.

The Court: Very well. I wish you would bear in mind the additional charge I have just given you, because it is important if you can conscientiously do so that you arrive at a verdict.

Mr. Shenker: The defendant will except to the Court's instruction on the additional instruction it gave to the jury, on the ground that we feel that that is undue, that instruction would unduly influence the jury in an attempt to give up some of their obligations and their convictions.

Mr. London: Also add to that, that the fact the Court's charge states that it is an important case would in this case necessarily leave an impression upon the minds of the jurors that the Court is referring to the importance of the defendants and this would, therefore, unduly influence the jurors in attempting to reach their verdict when in fact the jurors had indicated nothing to the effect that they were unable to reach a verdict or that they felt they would be unable to reach a verdict, the only point in the jury being down here at this time was to be sent out to dinner. The jury had deliberated approximately two hours and 25 minutes at the time they came down.

[fol. 323] Defendants' Requested Instruction No. 7.

The Federal Firearms Act does not prohibit the possession of firearms by persons heretofore convicted of crimes of violence, and the Act only applies to firearms which were shipped or transported or received by such person in violation of the Federal Firearms Act.

Refused, Moore, J.

[fol. 324] Verdict.

We the jury in the above entitled cause on the trial of the Indictment herein find as follows:

We find the defendant Joseph Costello guilty as charged in Count 1 of the indictment herein.

We find the defendant Joseph Costello guilty as charged in Count 2 of the indictment herein.

We find the defendant Joseph Costello guilty as charged in Count 3 of the indictment herein.

We find the defendant Joseph Costello guilty as charged in Count 4 of the indictment herein.

Verdict.

We the jury in the above entitled cause on the trial of the Indictment herein find as follows:

We find the defendant Joseph John Cannella guilty as charged in Count 1 of the Indictment herein.

We find the defendant Joseph John Cannella guilty as charged in Count 2 of the Indictment herein.

We find the defendant Joseph John Cannella guilty as charged in Count 4 of the Indictment herein.

M. F. HUBBELL,
Foreman.

Dated this 18 day of April, 1957.

[fol. 325] Defendant Costello's Renewed Motion for Judgment of Acquittal, or in the Alternative for a New Trial:

(Filed in U. S. District Court on May 6, 1957.)

I.

Renewed Motion for Judgment of Acquittal.

Defendant Costello renews his motion for judgment of acquittal made at the close of all the evidence and moves the Court to set aside the verdict of guilty on each count of the indictment and to enter a judgment of acquittal for the reason that the evidence is insufficient to sustain a conviction.

II.

Motion for a New Trial.

Defendant Costello, in the event that the Court overrules his renewed motion for judgment of acquittal, moves the Court to set aside the verdict of guilty on each count of the indictment and grant him a new trial, and as his grounds for this motion states:

(1) The Court erred in overruling defendant's motion to dismiss.

(2) The Court erred in overruling defendant's motion to suppress evidence.

(3) The Court erred in overruling defendant's motion for judgment of acquittal made at the close of the entire case.

(4) The Court erred in overruling defendant's motion for a mistrial.

[fol. 326] (5) The Court erred in overruling objections of defendants to testimony and exhibits offered by the United States and in admitting into evidence, over the objections of defendants, irrelevant, immaterial and incompetent evidence offered by the United States.

(6) The Court erred in its instructions to the jury for the reasons called to the Court's attention in the exceptions to the Court's charge.

(7) The Court erred in permitting the government to cross-examine government witness Sidney Goldstein.

(8) The Court erred in denying defendant the right to introduce defendant's Exhibit C consisting of 7 payroll checks payable to J. Vicich by the Ace Cab Company and Ace Service Company.

(9) The Court erred in permitting witness Les Davidson, United States Deputy Marshal, to testify in an attempt to impeach government witness Sidney Goldstein on a collateral matter.

(10) The Court erred in permitting Jack Fisher and Earl Porter, agents of the F. B. I., to testify in order to contradict witness Sidney Goldstein on collateral matters.

(11) The Court erred in denying counsel for defendant the right to make an opening statement on the question of profit on the guns, as this issue was a circumstance to be considered by the jury.

(12) The Court erred in failing to grant a mistrial and in failing to grant a severance to defendant Costello after admitting testimony of statements made by defendant Cannella to agents of the Federal Bureau of Investigation.

(13) The Court erred in permitting the United States Attorney to cross-examine defendant Costello on his being shot, on whether he had other guns and on whether when he was arrested by the F. B. I. in connection with this case they found a gun in the rear of the car, all of which examination went beyond the testimony in chief and was immaterial and irrelevant to the case at issue and did not involve the guns that were the subject of this indictment.

[fol. 327] (14) The Court erred in permitting the Government to offer into evidence on rebuttal other guns not the subject of this indictment and which were not competent as evidence in the case.

(15) The Court erred in permitting the Government in rebuttal to offer testimony of witness Leonard J. Gorman that defendant Costello and his wife were customers at his store.

(16) The Court erred in permitting witness Evelyn Weir to testify as to statements made by Cannella before the

grand jury and in refusing to grant a severance and a mistrial to defendant Costello in view of her testimony.

(17) The Court erred in refusing to permit into evidence Defendant's Exhibit F, the information on which the conviction of Joe Costello was founded and in refusing to consider that this was a conviction for burglary in the second degree which is not covered by the statute and in failing to instruct the jury that Costello was convicted for burglary in the second degree.

(18) That the Court erred in permitting the Government to cross-examine Government witnesses Harry Arnold, Earl Lewis, Charles Klaich and David Cannella, for the reason that no foundation was laid for the cross-examination of said witnesses, and there was no basis for permitting the Government to attempt to impeach its own witnesses.

(19) The Court erred in instructing the jury, after only about two hours of deliberation, that it should use all efforts to attempt to reach a decision in the case, for the reason that the jury had not indicated at that time that it was unable to arrive at a verdict, and there was no basis for the Court's instruction at that time.

(20) The Court erred in failing to grant a mistrial and in failing to grant a severance as to this defendant, when during the course of the Government's opening statement and during the course of the Government's evidence statements were made and testimony was given to the effect that [fol. 328] co-defendant Cannella had implicated this defendant and had indicated his fear, if this defendant learned of Cannella's statements, for the reason that said statements and testimony were so prejudicial to the rights of this defendant, that such prejudice could not be eradicated by an instruction limiting said statements to co-defendant Cannella, and defendant Costello could not under these circumstances receive a fair trial.

MORRIS A. SHENKER,
Attorney for Defendant Costello.

The above motion was by the Court overruled on May 9, 1957.

[fol. 329] Defendant Cannella's Renewed Motion for Judgment of Acquittal, or in the Alternative for a New Trial.

(Filed in U. S. District Court on May 6, 1957.)

I.

Renewed Motion for Judgment of Acquittal.

Defendant Cannella renews his motion for judgment of acquittal made at the close of all the evidence and moves the Court to set aside the verdict of guilty on each count of the indictment upon which he was convicted, and to enter a judgment of acquittal on said counts for the reason that the evidence is insufficient to sustain a conviction on said counts as to this defendant.

II.

Motion for a New Trial.

Defendant Cannella, in the event that the Court overrules his renewed motion for judgment of acquittal, moves the Court to set aside the verdict of guilty on each count of the indictment and grant him a new trial and as his grounds for this motion states:

(1) The Court erred in overruling defendant's motion to dismiss.

(2) The Court erred in overruling defendant's motion to suppress evidence.

(3) The Court erred in overruling defendant's motion for judgment of acquittal made at the close of the entire case.

(4) The Court erred in overruling defendant's motion for a mistrial.

[fol. 330] (5) The Court erred in overruling objections of defendants to testimony and exhibits offered by the United States and in admitting into evidence, over the objections of defendants, irrelevant, immaterial and incompetent evidence offered by the United States.

(6) The Court erred in its instructions to the jury for the reasons called to the Court's attention in the exceptions to the Court's charge.

(7) The Court erred in permitting the government to cross-examine government witness Sidney Goldstein.

(8) The Court erred in denying defendant the right to introduce Defendant's Exhibit C consisting of 7 payroll checks payable to J. Vichick by the Ace Cab Company and Ace Service Company.

(9) The Court erred in permitting witness Les Davidson, United States Deputy Marshal, to testify in an attempt to impeach government witness Sidney Goldstein on a collateral matter.

(10) The Court erred in permitting Jack Fisher and Earl Porter, agents of the F. B. I., to testify in order to contradict witness Sidney Goldstein on collateral matters.

(11) The Court erred in permitting the United States Attorney to cross-examine defendant Costello on his being shot, on whether he had other guns and on whether when he was arrested by the F. B. I. in connection with this case they found a gun in the rear of the car; all of which examination went beyond the testimony in chief and was immaterial and irrelevant to the case at issue and did not involve the guns that were the subject of this indictment.

(12) The Court erred in permitting the government to offer into evidence on rebuttal other guns not the subject of this indictment and which were not competent as evidence in the case.

(13) The Court erred in permitting the introduction into evidence of portions of the alleged grand jury testimony of this defendant for the reason that said alleged testimony was introduced as substantive evidence in the Government's case, and this defendant was a prospective defendant at the time he was summoned to testify [fol. 331] before the grand jury, and was not then represented by counsel.

(14) The Court erred in failing to permit this defendant the right to cross-examine witness Evelyn Weir with regard to other matters and things contained in the al-

leged grand jury testimony of this defendant, and in failing to permit this defendant to introduce other portions of his alleged grand jury testimony into evidence.

(15) The Court erred in refusing to permit into evidence Defendant's Exhibit F, the information on which the conviction of Joe Costello was founded and in refusing to consider that this was a conviction for burglary in the second degree which is not covered by the statute and in failing to instruct the jury that Costello was convicted for burglary in the second degree.

(16) That the Court erred in permitting the Government to cross-examine Government witnesses Harry Arnold, Earl Lewis, Charles Klaich and David Cannella, for the reason that no foundation was laid for the cross-examination of said witnesses, and there was no basis for permitting the Government to attempt to impeach its own witnesses.

(17) The Court erred in instructing the jury, after only about two hours of deliberation, that it should use all efforts to attempt to reach a decision in the case, for the reason that the jury had not indicated at that time that it was unable to arrive at a verdict, and there was no basis for the Court's instruction at that time.

(18) The Court erred in failing to order the Government to furnish this defendant with all of the alleged grand jury testimony given by this defendant, for the reason that the grand jury testimony of this defendant which was ordered by this Court to be furnished to the defendant by the government referred and related to prior grand jury testimony allegedly given by this defendant, and which testimony defendant required in order properly to present his defense.

[fol. 332] (19) The Court erred in failing to grant a mistrial and a severance as to this defendant, after the Court permitted the Government to offer rebuttal evidence with respect to other guns of defendant Costello, for the reason that such evidence was so prejudicial to this defendant that its effect could not be erased by an instruction limiting this evidence to the defendant Costello.

(20) The Court erred in admitting into evidence a statement allegedly made by him to agents of the F. B. I., for

the reason that according to said agents' testimony, the said statement was not in this defendant's words, was not signed by him, but was dictated by one of said agents, that said statement was therefore hearsay and not binding on the defendant.

(21) The Court erred in admitting said statement allegedly made by him to agents of the F. B. I. for the reason that said statement was in many respects contrary to other evidence offered by the Government, and said statement was therefore an attempt by the Government to impeach its own evidence.

NORMAN LONDON,
Attorney for Defendant Cannella.

The above motion was by the Court overruled on May 9, 1957.

[fol. 333] (Judgment and Sentence as to Defendant, Joseph Costello.)

(Filed in U. S. District Court on May 9, 1957.)

United States District Court
for the
Eastern District of Missouri—Eastern Division.

United States of America v. Joseph Costello, a/k/a George Costello	No. 28578 (1) Criminal.

On this 9th day of May, 1957, came the attorney for the government and the defendant appeared in person and with Morris Shenker, his attorney.

It Is Adjudged that the defendant has been heretofore convicted upon his plea of not guilty and a verdict of guilty of the offenses of unlawfully shipping and transporting and causing to be shipped and transported in in-

terstate commerce, a firearm, said defendant having prior thereto been convicted of a crime of violence, as charged in Counts 1 and 2 of indictment; unlawfully receiving a firearm which had been shipped in interstate commerce, said defendant having prior thereto been convicted of a crime of violence, as charged in Count 3 of indictment; unlawfully combining, conspiring and agreeing with others to commit offenses against the laws of the U. S. by transporting and causing to be transported and shipped in interstate commerce, certain firearms, and by having said defendant receive a firearm so shipped and transported, said defendant having prior thereto been convicted of a crime of violence, as charged in Count 4 of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Thirty (30) Months as to and under the charge as contained in Each of Counts One, Two, Three, and Four of the Indictment herein, such terms of imprisonment to begin, run and terminate concurrently.

It Is Adjudged that said defendant be and he is hereby granted a stay of execution of judgment and sentenced until May 27, 1957, and defendant released on his existing appearance bond until such date.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

GEO. H. MOORE,
United States District Judge.

[fol. 334] (Judgment and Sentence as to Defendant, Joseph John Cannella.)

(Filed in U. S. District Court on May 9, 1957.)

United States District Court
For the Eastern District of Missouri,
Eastern Division.

United States of America
v.
Joseph John Cannella.
No. 28578 (1) Criminal.

On this 9th day of May, 1957, came the attorney for the government and the defendant appeared in person and with Norman S. London, his attorney.

It Is Adjudged that the defendant has been heretofore convicted upon his plea of not guilty and a verdict of guilty of the offenses of unlawfully shipping and transporting and causing to be shipped and transported in interstate commerce, a firearm, his co-defendant Joseph Costello having prior thereto been convicted of a crime of violence, as charged in Counts 1 and 2 of indictment; unlawfully combining, conspiring, and agreeing with others to commit offenses against the laws of the U. S. by transporting and shipping and causing to be transported and shipped in interstate commerce, certain firearms, and by having co-defendant Joseph Costello receive a firearm which had been shipped and transported in interstate commerce, co-defendant Joseph Costello having been convicted of a crime of violence, as charged in Count 4 of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) months as to and under the charge as contained in

each of Counts One, Two and Four of the indictment herein, such terms of imprisonment to begin, run and terminate concurrently.

It Is Adjudged that said defendant be and he is hereby granted a stay of execution of judgment and sentence until May 27, 1957, and defendant released on his existing appearance bond until such date.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

GEO. H. MOORE,
United States District Judge.

[fol. 335] (Notice of Appeal of Defendant, Joseph Costello.)

(Filed in U. S. District Court on May 14, 1957.)

United States District Court, Eastern District of Missouri, Eastern Division.

United States of America,
Plaintiff,
v.
Joseph Costello, a/k/a George Costello, and Joseph John Cannella,
Defendants,
No. 28578 (1).

(1) Name and address of appellant: Joseph Costello, 2626 Gurney Court, St. Louis, Missouri.

(2) Name and address of appellant's attorney: Morris A. Shenker, 408 Olive Street, St. Louis, Missouri.

(3) Offenses charged:

Count I charged that on December 22, 1955, defendants shipped and transported in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, a revolver bearing serial No. 68897 and that defendant Costello had

prior thereto been convicted of a crime of violence contrary to § 902 (e) of Title 15, United States Code.

Count II charged that on December 22, 1955, defendants shipped and transported in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, a revolver bearing serial No. 65965 and that defendant Costello had prior thereto been convicted of a crime of violence contrary to § 902 (e) of Title 15, United States Code.

Count III charged that on December 22, 1955, defendant Costello ~~received a revolver~~ bearing serial ~~No. 68897 which~~ had been shipped in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, and that defendant Costello had prior thereto been convicted of a crime of violence contrary to § 902 (f) of Title 15, United States Code.

[fol. 336] Count IV charged that defendants, commencing on June 1, 1955 to the date of the indictment, conspired together to ship and transport in interstate commerce revolvers from Granite City, Illinois, to St. Louis, Missouri, that Defendant Costello received a firearm which had been shipped in interstate commerce and that defendant Costello had prior thereto been convicted of a crime of violence, that on December 22, 1955, in furtherance of the conspiracy, defendant Cannella obtained two revolvers from a person in Granite City, Illinois, contrary to § 371 of Title 18, United States Code.

(4) Concise statement of judgment: Judgment of May 9, 1957, adjudging that defendant Costello had been convicted upon his plea of not guilty and a jury verdict of guilty, and committing him to imprisonment for a period of 30 months under Count I, committing him to imprisonment for a period of 30 months under Count II, committing him to imprisonment for a period of 30 months under Count III, and committing him to imprisonment for a period of 30 months under Count IV of the indictment, the terms of imprisonment to run concurrently.

(5) Appellant is on bail under a stay of execution of the judgment expiring on May 27, 1957.

The above named appellant, Joseph Costello, hereby appeals to the United States Court of Appeals for the

Eighth Circuit from the above-stated judgment of May 9, 1957.

Dated: May 14, 1957.

MORRIS A. SHENKER,
Attorney for Appellant Costello.

[fol. 337] (Notice of Appeal of Defendant, Joseph John Cannella.)

(Filed in U. S. District Court on May 14, 1957.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
v.
Joseph Costello, a/k/a George Costell and Joseph John Cannella,
Defendants.
No. 28578 (1)

(1) Name and address of appellant: Joseph John Cannella, 11200 St. John, St. Ann's, Missouri.

(2) Name and address of appellant's attorneys: Mark M. Hennelly and Norman London, Arcade Building, St. Louis, Missouri, and Sidney M. Glazer, 408 Olive Street, St. Louis, Missouri.

(3) Offenses charged:

Count I charged that on December 22, 1955, defendants shipped and transported in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, a revolver bearing serial No. 68897 and that defendant Costello had prior thereto been convicted of a crime of violence contrary to § 902 (e) of Title 15, United States Code.

Count II charged that on December 22, 1955, defendants shipped and transported in interstate commerce from

Granite City, Illinois, to St. Louis, Missouri, a revolver bearing serial No. 65965 and that defendant Costello had prior thereto been convicted of a crime of violence contrary to § 902 (e) of Title 15, United States Code.

Count IV charged that defendants, commencing on June 1, 1955, to the date of the indictment, conspired together to ship and transport in interstate commerce revolvers from Granite City, Illinois, to St. Louis, Missouri, that defendant [fol. 338] Costello received a firearm which had been shipped in interstate commerce and that defendant Costello had prior thereto been convicted of a crime of violence, that on December 22, 1955, in furtherance of the conspiracy, defendant Cannella obtained two revolvers from a person in Granite City, Illinois, contrary to § 371 of Title 18, United States Code.

(4) Concise statement of judgment:

Judgment of May 9, 1957 adjudging that defendant Costello had been convicted upon his plea of not guilty and a jury verdict of guilty, and committing him to imprisonment for a period of 18 months under Count I, committing him to imprisonment for a period of 18 months under Count II, and committing him to imprisonment for a period of 18 months under Count IV of the indictment, the terms of imprisonment to run concurrently.

(5) Appellant is on bail under a stay of execution of the judgment expiring on May 27, 1957.

The above-named appellant, Joseph John Cannella hereby appeals to the United States Court of Appeals for the Eighth Circuit from the above-stated judgment of May 9, 1957.

Dated: May 14, 1957.

MARK M. HENNELLY,
NORMAN LONDON,
SIDNEY M. GLAZER,
Attorneys for Appellant Cannella.

[fol. 339] (Essential Docket Entries in United States District Court.)

Criminal Docket
28578 (1)

The United States

vs.

Joseph Costello, a/k/a, George Costello,
and Joseph John Cannella.

A True Bill—4 counts, violation Title 15, Sec. 902 (e)
Title 18, Sec. 2
Title 18, Sec. 371

For U. S.: U. S. Attorney.

For Defendant: Bernard Mellman.

1956

Apr. 23 Indictment filed.

Apr. 30 Defts. Jos. Costello and Jos. J. Cannella appear with Bernard Mellman, their atty. On oral application, defts. granted to May 21, 1956, to file pretrial motions and such motions so filed set for hearing on May 25, 1956, and cause passed for arraignment of defts. until such date.

May 21 By consent, defts. granted to and including June 4, 1956 within which to file contemplated pretrial motions and such motions so filed reset for hearing from May 25, 1956 to June 8, 1956. Arraignment of defts. passed from May 25, 1956, to June 8, 1956.

[fol. 340] June 4 On oral appln., defts. granted extension of time to June 11, 1956, within which to file pretrial motions.

June 8 Cause passed for arraignment of defts. Costello and Cannella to June 15, 1956 at 10 A. M.

June 11 Separate motions of defts. Joseph Costello and Joseph J. Cannella to dismiss ind., and to suppress evidence, and separate motion of deft.

Joseph J. Cannella to inspect grand jury minutes, with endorsed requests for oral arguments on aforesaid motions, filed.

June 15 On oral appln. of counsel for defts., all pending motions of defts. as well as arraignment of defts. passed to June 28, 1956.

June 28 Deft. Jos. Costello appears with Morris Shenker, his Atty., & Deft. Jos. J. Cannella appears with Mark Hennelly, his Atty. On oral appln. defts. granted leave to file amended motions to dismiss. Hearing on all motions of defts. passed to July 26th, 1956. On arraignment, deft. Costello enters plea of not guilty to each of Cts. 1, 2, 3 & 4 of Ind. & deft. Cannella enters plea of not guilty to each of Cts. 1, 2 & 4 of said Ind. Cause for the Term of trial setting.

July 23 Separate supplemental motions of defts. Joseph Costello and Joseph J. Cannella to dismiss ind., with endorsed request for oral argument thereon, filed.

July 26 On joint oral motions of defts., all pending motions passed for hearing to Sept. 27, 1956.

Sept. 27 Defendants Joseph Costello and Joseph J. Cannella appear with Sidney Glazer, their attorney. All pending motions passed to October 5, 1956.

Oct. 4 By consent, motions of defendants heretofore set for hearing October 5, 1956, vacated and same reset for hearing October 12, 1956.

Oct. 12 Separate motions of defendants Costello and Cannella to suppress evidence heard and submitted. Separate motions and supplemental motions of defendants to dismiss indictment, as well as separate motion of defendant Cannella to inspect Grand Jury minutes submitted without arguments on briefs to be hereafter presented; defts. granted 20 days to submit brief and the Government 15 days thereafter to present answering brief and defendants 5 days thereafter to submit reply brief.

Dec. 11 Separate orders filed overruling motions of defendant Joseph J. Cannella (1) to dismiss Indictment (2) to suppress evidence, and (3) to inspect grand jury minutes. Separate orders filed overruling motions of defendant Joseph Costello (1) to suppress evidence, and (2) supplemental motion to dismiss Indictment. (Copy of orders mailed to attorneys by Court.)

1957

Jan. 16 On oral motion of U. S. Attorney, cause set for trial on Monday, April 8, 1957. (Attorneys notified.) (Defts. and surety notified.)

[fol. 341] April 2 Renewed motion of defendant Jos. Costello to suppress evidence with request for oral argument, filed.

April 8 Renewed motion of defendant Joseph Costello, as adopted by defendant Jos. J. Cannella, to suppress evidence heard, argued, submitted and overruled.

April 8 Defendants Jos. Costello and Jos. J. Cannella appear with Morris Shenker and Norman London, their attorneys. Defendant Costello having heretofore entered plea of not guilty to each of counts 1, 2, 3 and 4 of indictment and defendant Cannella having heretofore entered his plea of not guilty to each of counts 1, 2 and 4 of indictment, and parties announcing ready for trial, jury empaneled and sworn. Further proceedings postponed until tomorrow at 10 A. M.

April 9 Again come parties and jury; whereupon introduction of evidence on behalf of Government on trial of defendants Costello and Cannella as charged in Indictment is commenced but not concluded. Further proceedings passed until tomorrow at ten A. M. Motion of defendant Costello for severance filed by leave, argued, submitted and overruled.

April 10 Again come parties and jury; whereupon introduction of evidence on behalf of the Government

is resumed but not concluded and further proceedings postponed until tomorrow at 10 A. M.

April 11 Again come parties and jury; whereupon introduction of evidence on behalf of Government on trial of defendants is resumed but not concluded and further proceedings postponed until Monday, April 15, 1957 at 10 A. M.

[fol. 342] April 15 Again come parties and jury; whereupon introduction of evidence on behalf of plaintiff is resumed and concluded. Separate motions of defendants Costello and Cannella for judgment of acquittal and to require plaintiff to elect upon which count it will proceed, at close of plaintiff's case in chief filed, submitted and overruled. Introduction of evidence on behalf of defendants commenced but not concluded and further proceedings postponed until tomorrow at 10 A. M.

April 16 Again come parties and jury; whereupon evidence on behalf of defendants is resumed and concluded. Thereupon introduction of evidence in rebuttal on behalf of plaintiff is commenced but not concluded and further proceedings postponed until tomorrow at 10 A. M.

April 17 Again come parties and jury; whereupon the introduction of evidence in rebuttal on behalf of plaintiff is resumed and concluded. Separate motions of defendants Costello and Cannella for judgment of acquittal at the close of all the evidence filed, submitted and overruled. By leave, separate motions of defendants filed at close of plaintiff's case to require plaintiff to elect upon which count it will proceed, are refiled at close of all the evidence, submitted and overruled as to each defendant. The jury after arguments of counsel and being duly charged by the Court retires to consider its verdict. The jury not having arrived at its verdict at the hour of 7:00 P. M., said jury is remanded to the custody of the U. S. Marshal for the purpose of obtaining its evening meal. Omar L. Schnatmeier, U. S. Marshal, and James A. Reid designated by the Court

to keep said jury in their charge during such recess; whereupon said Omar L. Schnatmeier and James A. Reid take the prescribed oath. Said jury thereafter returns into Court at hour of 8:15 P. M. and again retires to resume its deliberations.

April 18 Again come parties and jury; after deliberation upon its verdict the jury returns into Court at one o'clock a. m. its separate verdicts finding defendant Costello guilty as to each of Counts 1 thru 4 inclusive of Indictment and defendant Joseph John Cannella guilty as to each of Counts 1, 2 and 4 of Indictment. On request of defendants jury polled and answers in the affirmative questions propounded by Clerk. Verdicts ordered filed and filed. On oral motion defendants granted to May 6, 1957 to file motions for new trial and in arrest of judgment, and such motions docketed for May 9, 1957. Imposition of sentence deferred to May 9, 1957.

May 6 Separate renewed motion for judgment of acquittal, or in the alternative for a new trial filed by each of defendants Joseph Costello and Joseph Cannella. Oral arguments requested on motions.

[fol. 343] May 9. Defendant Joseph Costello appears with Morris Shenker, his attorney, and defendant Joseph Cannella appears with Norman S. London, his attorney; whereupon separate renewed motions of defendants for judgment of acquittal, or in the alternative for a new trial argued, submitted and each of said motions overruled.

Defendant Costello under verdict heretofore returned by jury on trial of cause finding said defendant guilty as charged in each of counts 1, 2, 3 and 4 of indictment committed to the custody of the Attorney General for imprisonment for a term of 30 months, such terms to run concurrently. On oral application, defendant granted stay of execution of aforesaid judgment and sentence until May 27, 1957 and defendant released on his existing appearance bond until such date.

Defendant Cannella under verdict heretofore returned by jury on trial of cause finding said defendant guilty as charged in each of counts 1, 2 and 4 of indictment committed to the custody of the Attorney General for imprisonment for a term of 18 months, such terms to run concurrently. On oral application, defendant granted stay of execution of aforesaid judgment and sentence until May 27, 1957 and defendant released on his existing appearance bond until such date.

MOORE, J.

Judgments and commitments issued. Certified copies to U. S. Marshal.

May 14 Separate notices of appeals filed by defts Joseph Costello and Joseph J. Cannella; copy mailed to U. S. Attorney. Two certified copies of Clerk's docket entries transmitted to Court of Appeals, Eighth Circuit, for eac. of defendants Costello and Cannella.

[fol. 344] In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

I, George J. Brennan, Clerk of the United States District Court for the Eastern District of Missouri, certify that the above and foregoing is a photostatic reproduction of the original docket entries in Case No. 28578 (1), United States of America vs. Joseph Costello et al., and is submitted as the relevant docket entries provided for in Rule 8 (d) of the United States Court of Appeals for the Eighth Circuit.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at St. Louis, Missouri, this 15th day of May, 1957.

(Seal)

GEO. J. BRENNAN,
Clerk,

By EILEEN V. COLLUM,
Deputy Clerk.

No. 221

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 221

JOSEPH COSTELLO,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

MORRIS A. SHENKER,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. .....

JOSEPH COSTELLO,
Petitioner,

vs

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on May 20, 1958.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, p. 17) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 20, 1958 (Appendix, infra, p. 36). A timely petition for rehearing was filed, and this petition was overruled on June 27, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether the Federal Firearms Act which prohibits the interstate transportation and receipt of firearms by any person who has been convicted of a crime of violence defined by the act to include "burglary" prohibits the transportation and receipt of firearms by a person who has been convicted under a state second degree burglary statute of breaking and entering a jewelry store with intent to steal.

(2) Whether evidence obtained by state officers in a search and seizure found to be illegal in a proceeding in a state court which follows the rule of exclusion is admissible in federal court despite the Fourth Amendment and the proper standards for the enforcement of federal criminal statutes in federal courts.

(3) Whether it was error for the trial court to deny a severance and a separate trial in a joint trial involving petitioner and a co-defendant where the court admitted into evidence extra-judicial statements of the co-defendant that he feared for his life if a written incriminatory statement made by the co-defendant implicating petitioner would come to petitioner's attention.

(4) Whether, in a prosecution under the Federal Firearms Act which prohibits the interstate transportation and receipt of firearms by any person who has been convicted

of a crime of violence, it is error to instruct the jury relative to the testimony of the defendant as a witness that a witness may be impeached by showing a felony conviction and that the entire testimony of an impeached witness may be disregarded.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

Federal Firearms Act, § 1, 15 U. S. C. 901, provides in part as follows:

Definitions

As used in this chapter——

* * * * * * *

(6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, robbery, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

* * * * * * *

Federal Firearms Act, § 2, 15 U. S. C. 902, provides in part as follows:

* * * * * * * *

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugutive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such

person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter.

* * * * * * * *

United States Constitution, Amendment IV, provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * * * * * *

STATEMENT.

Petitioner and Joseph John Cannella were convicted by a jury under a four count indictment, which charged in the first two counts the transportation of a described firearm in interstate commerce by defendants and that petitioner had a prior conviction of a crime of violence, burglary in a Missouri state court. The third count against petitioner alone charged that he unlawfully received the firearm mentioned in count one which had been transported in interstate commerce having prior thereto been convicted of the same crime of violence. The fourth count charged both defendants with conspiracy to commit the substantive crimes charged and that in furtherance of the conspiracy Cannella obtained several revolvers including the described revolvers (R. 1-3).

Petitioner had been convicted in the Circuit Court of Missouri in 1936 under an information which charged that he feloniously did break and enter into a certain jewelry store with intent to steal certain described jewelry therein and did steal it (R. 59-60, 266-270).

On February 27, 1956, while operating an automobile, petitioner was arrested by St. Louis police officers and taken to police headquarters where he was questioned (R. 13-14, 125). Shortly after his arrival at headquarters F. B. I. agents came and also questioned him (R. 14, 20). Petitioner's automobile was placed in the police garage where it was searched by a police officer who found the revolver described in counts one and three of the indictment and one of the revolvers mentioned in count four (R. 12). The arrest, search and seizure were found to have been illegal under Missouri law in a criminal case in which petitioner was charged with carrying a concealed weapon in a proceeding in the Missouri State Court (R. 34-36). A motion to suppress all evidence obtained directly or indirectly as a result of this search and seizure were made and overruled in the case below (R. 4-5, 11-20, 28-42, 111-112, 125-126, 128, 130, 138-139). It was conceded that the entire indictment was the result of the February arrest (R. 32).

Cannella first gave a statement to agents of the F. B. I. on April 10, 1956, in which he stated he alone had purchased the guns described in the indictment, that he had borrowed petitioner's Cadillac to attend a wedding, that he had transferred a gun to the glove compartment and that he had forgotten about the gun (R. 149, 162-164). He then made a written statement to the F. B. I. in which he stated that petitioner had ordered the guns and that he had picked them up and given them to petitioner (R. 156-158). After making this statement Cannella told the F. B. I. agents "that he was very fearful of the fact that it would come to Mr. Costello's attention that he, Cannella, had provided this information to us" . . . "he used the expression that he did not think his life would be worth a nickel," and "he began running his hand over his forehead and rather continuously over a number of minutes,

'My God, My God, what is going to happen to me' " (R. 165): Cannella then became ill (R. 166). These statements were admitted into evidence over defense objections and petitioner unsuccessfully sought a severance, a separate trial and a mistrial because of these statements (R. 49-52, 53-56, 151, 155, 158, 159, 160-162, 164-166, 171).

Other evidence introduced by the government may be summarized as follows:

Petitioner lived in St. Louis, Missouri, and was the officer in charge of the Ace Cab Company in that city and Cannella was in the employ of the company as a supervisor and cab driver. In 1955 petitioner made inquiry about getting a .38 revolver and was referred to a licensed gun dealer in Granite City, Illinois (R. 68). Petitioner and Cannella went together to the shop of the gun dealer and were shown and talked about guns. Later Cannella came to the shop alone and ordered three guns, which the dealer undertook to obtain for him (R. 104-105). When the guns were delivered, the dealer telephoned the Ace Cab Company and asked for the Joe that knew him and informed him that he had the guns (R. 109). Cannella then went and obtained the guns, signing a false name as purchaser, in the gun dealer's register (R. 109). One of these guns marked was subsequently found in petitioner's automobile.

Petitioner testified in his own behalf and denied any participation in obtaining the guns. He stated that he had loaned his car to Cannella on February 26, 1956, and did not know that there was a gun in his glove compartment (R. 224-227). Cannella testified that he had purchased the guns, that he had borrowed petitioner's automobile and left one of these guns and another old gun (not involved in the charge), in the glove compartment (R. 210-214). Cannella had been convicted of the crime of selling intoxicating liquor without a license, a felony (R. 281-282).

The trial judge, in its instructions to the jury, stated in part (R. 317):

> "Cross-examination has been undertaken and evidence has been introduced for the purpose of impeaching the testimony of various witnesses. A witness may be impeached by showing that he has been convicted of a felony, by showing that he has made prior statements contradictory to and inconsistent with the testimony given in court concerning matters material or relevant to the issues. If you find from the evidence that the credibility of a witness has been impeached, you are at liberty to disregard the entire testimony of that witness, unless such testimony has been corroborated by other evidence. If you find that any witness has willfully testified falsely to any material fact in this case, then you must disregard that testimony that you find to be false and you may disregard any or all of the testimony of that witness. On the other hand, you may accept such portion of the testimony of such witness who has been impeached or who has knowingly testified falsely as you believe to be true and credible."

The court below affirmed the conviction and found that petitioner's prior conviction was "burglary" within the meaning of the Federal Fire Arms Act because Congress did not intend to give that crime the meaning it had at common law. In regard to petitioner's arrest, search and seizure of the revolver from his automobile, the court recognized that the state court had found them to have been illegal but found no error because a federal officer did not take part in the search. As for the statements of Cannella that he feared for his life at the hands of petitioner, the court said that this testimony was admissible because it "bore not only upon the admissibility of Cannella's statement against his interest but also upon its credibility" and

that the fact that admissions have been made by one defendant is not a conclusive ground for ordering a separate trial. The court concluded that the instructions which were given as to credibility of witnesses were reasonable and proper.

REASONS FOR GRANTING THE WRIT.

1. This case presents a serious question of statutory construction under the Federal Firearms Act which has not been decided by this Court. Section 2 (e) and (f) of that Act, 15 U. S. C. 902 (e) and (f) makes it unlawful for any person who has been convicted of a crime of violence to transport or receive any firearm in interstate commerce. Section 1 (6) of the Act, 15 U. S. C. 901 (6) defines crime of violence and lists "burglary" as such a crime. The issue is whether the meaning of the word "burglary" as used in this provision is limited to common-law burglary which "is the breaking and entering in the night time of another's dwelling house with intent to commit a felony therein"[1] and whether in any event it includes the crime petitioner was shown to have committed in 1935. That crime which was the breaking and entering of a certain jewelry store with intent to steal, lacked the dwelling house and night time elements possessed by common-law burglary and is called burglary in the second degree under Missouri statute.[2]

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[1] 9 Am. Jur., Burglary, Section 1, page 239.

[2] In 1935, the Missouri statute which covered the offense of burglary in the second degree was Section 4048, R. S. Mo. 1929, which provided:

> "Every person who shall be convicted of breaking and entering any building, the breaking and entering of which shall not be declared by any statute of this State to be burglary in the first degree, or any booth or tent, or any boat or vessel, or railroad car in which there shall be at the time any human being or any goods, wares, merchandise or other valuable thing kept or deposited, with the intent to steal or commit any crime

Where a federal criminal statute "uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." **United States v. Turley,** 352 U. S. 407, 411. The court below found that burglary had an established common-law meaning but found that the purpose of the Act was directed against persons who had been convicted of crimes of violence, that burglary "has always been and now is universally so regarded" and therefore concluded that it was unreasonable to infer that Congress intended the word burglary "to be given the restricted meaning it had at common law."

But robbery, a crime containing the elements of the use of force against the person or placing a person in fear, was held not to be covered by the Act as originally enacted. Robbery was not listed in Section 1 (6) of the Act as a crime of violence but assault with intent to rob was so enumerated. In **Nicholson v. United States,** 9 Cir., 141 F. (2d) 552, the court found that unquestionably robbery at common law is a crime of violence and recognized that an assault with intent to rob is an essential element of the completed offense of robbery. Yet it held that robbery

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therein, shall on conviction be adjudged guilty of burglary in the second degree." (Section 560.070, R. S. Mo. 1949.)

Section 4042, R. S. Mo. 1929, defined burglary in the first degree as follows:

> "Every person who shall be convicted of breaking into and entering the dwelling house of another, in which there shall be at the time some human being, with intent to commit some felony or any larceny therein, either: First, by forcibly bursting or breaking the wall or outer door, window or shutter of a window of such house, or the lock or bolt of such door, or the fastening of such window or shutter; or, second, by breaking in any other manner, being armed with some dangerous weapon, or with the assistance and aid of one or more confederates, then actually present, aiding and assisting; or third, by unlocking an outer door by means of false keys, or by picking the lock thereof, shall be adjudged guilty of burglary in the first degree." (Section 560.040, R. S. Mo. 1949.)

was not a crime of violence within the meaning of the Act. As a result, Congress in 1947, amended Section 1 (6) to include robbery. 61 Stat. 11. It is significant that, in urging the amendment, the Attorney General conceded that robbery was not comprehended within the definition. H. R. Rep. No. 48, 81st Cong., 1947. U. S. Code Congressional Service 964. Certainly, a person with a prior conviction of robbery is more unfit to be entrusted with a firearm than a person who has merely been convicted of breaking into a commercial establishment with intent to steal.

Further support for the view that burglary must be given its common-law meaning is found in the construction of the Fugitive Felon Act, 18 U. S. C. 1073, which made it unlawful for any person to travel in interstate commerce with intent to avoid prosecution for certain enumerated crimes including burglary "under the laws of the place from which he flees." In **United States v. Brandenburg,** 3 Cir., 144 F. (2d) 656, it is held that since the statute used the term burglary without further definition it encompassed only those crimes which come within the common-law definition. As a result, Congress in 1946 rewrote that Act and inserted the phrase "offenses as they are defined either at common-law or by the laws of the place from which the fugitive flees."

It is also the rule that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law," **United States v. Turley,** 352 U. S. 407, 411. There is no indication of such an intent and yet that is the effect of the decision of the court below.

2. The Court below recognized that the arrest, search and seizure of the revolvers by State police officers from petitioner's automobile was illegal under Missouri law and had been so determined in a State criminal law in the State

Courts of Missouri. There was no contention made by the government that they were legal under federal law. Yet the Court below refused to suppress the evidence because "it was not shown that any federal officer took part in the search".[3] It is petitioner's position that the revolvers should have been suppressed as evidence in the federal courts because articles seized in an unreasonable search and seizure by State officers in a State which excludes illegally obtained evidence in its Courts should also be excluded in the federal courts. This issue has not been considered in this Court either as to whether it violates the Fourth Amendment or as to whether it violates the proper standards for the enforcement of federal criminal statutes in federal courts.

The rule in most states is that illegally obtained evidence is admissible in the State Courts[4] and Missouri is one of the minority of States which hold such evidence inadmissible and has decided that, in order to protect the individual, its officers should be subject to the deterrent effect of the exclusionary rule. The rule adopted by the Court below admitting evidence obtained by a State officer acting illegally under State law, would frustrate the deterrent effect of the State exclusionary rule. The rule which petitioner urges would not require that State Courts adopt the federal rule of exclusion. But if a State followed the rule, the federal courts would not frustrate their policy. It would protect the individual and act as a deterrent against improper official action by State officers.

Support for the exclusion of this evidence is found in **Rea v. United States**, 350 U. S. 214, where a federal narcotic agent was enjoined from testifying in a State Court

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[3] Lustig v. United States, 338 U. S. 74; Weeks v. United States, 232 U. S. 383.

[4] Wolf v. Colorado, 338 U. S. 25.

prosecution with respect to narcotics obtained by the agent in the course of an illegal search. A federal agent is not allowed to frustrate federal law designed to protect the privacy of a citizen. Similarly, State officers should not be allowed to frustrate State law by testifying in federal Court. In **Gambino v. United States**, 275 U. S. 310, an illegal arrest and search made by State officers solely for the purpose of aiding a prosecution of a federal offense was held not admissible in a Federal Court. If a State forbids the use of illegally obtained evidence but the evidence is admissible in Federal Court, then an illegal arrest and search by its officers becomes one solely for the purpose of aiding a federal prosecution and receives encouragement from federal policy.

This Court in **Benanti v. United States**, 355 U. S. 96, 102, fn. 10, in a footnote stated that it "has remained an open question in this court whether evidence obtained solely by state agents in an illegal search may be admissible in Federal court, despite the Fourth Amendment." Certainly evidence obtained solely by state agents in an illegal search in a state which follows the exclusionary rule should not be admissible in Federal court.

3. The court below has concluded that there was no error in denying the request of Costello for a severance and a separate trial from Cannella and has held that "the mere fact that admissions had been made by one (defendant) which are not evidence against the other is not a conclusive ground for ordering the parties to be tried separately." But the basis for a motion for a severance and a separate trial was not merely the incriminatory statements of Cannella. The motion was also based on the testimony of F. B. I. agents that Cannella at the conclusion of his statement stated that he was fearful that it would come to Costello's attention that he had provided information to the F. B. I. that he used the expression that he "did

not think his life would be worth a nickel," that he said, "My God, My God, what is going to happen to me?", and that he became ill. The court below has concluded that these statements were admissible for the purpose of showing the admissibility of Cannella's alleged statement and also its credibility and that there was no error because the jury was told that a statement made by Cannella after the acts alleged to be committed was hearsay and not probative of guilt as to Costello.

This case goes beyond any practical limitations under which a jury should be left to follow instructions to disregard evidence as to one defendant only. **Delli Paoli v. United States,** 352 U. S. 232. Extraordinary facts appear from which it can be said that the denial of a separate trial was an abuse of discretion. Evidence of an exceptionally prejudicial character were the statements of Cannella, quoted above, to the effect if petitioner ever heard of Cannella's confession that Cannella's life would be in danger. The court below found that the jury could consider these statements of Cannella's fear of petitioner as a circumstance bearing upon the admissibility of Cannella's incriminatory statements to the F. B. I. and its credibility. But this statement would undoubtedly create in the minds of the jury the impression that petitioner was the type of individual who would intimidate or even kill for his own self interest. Such an impression was so highly prejudicial that any instruction on the part of the court could not remove it from the mind of the jury. Moreover, a jury which found that Cannella's alleged second statement was credible because the initial statement denying guilt was made because of fear of death at petitioner's hands would also find that Cannella was in fact fearful of petitioner. After finding such fear the jury would not have been able to disassociate this conclusion from the rest of the evidence in the case and would further conclude that petitioner was the type of individual who would intimidate or kill in his own

self interest. The result of this conclusion would overpersuade the jury and make them prejudge petitioner because of this evidence of his bad general conduct and would deny him a fair opportunity to defend against the instant charges. **Cf. Michelson v. United States**, 335 U. S. 469, 475. At the joint trial petitioner was not merely faced with admissions made by his co-defendant outside his presence, but with evidence which blackened petitioner's reputation to such an extent that a fair trial was impossible.

We can see that certain things of a minor nature can be eliminated from the jury's consideration by a proper instruction of the court. However, a statement to the effect that a defendant is a potential killer does not fall within this category and any instruction by the court, no matter how strongly worded, could not effectively remove it from the jury's consideration either consciously or subconsciously. Moreover, Cannella's confession did not merely touch upon the activities of petitioner but was the strongest item in the case implicating petitioner. If this case does not involve an abuse of discretion, then it appears that for all practical purposes trial courts have absolute power to decide whether or not to order separate trials. Cf. **Opper v. United States**, 348 U. S. 84, 95.

Furthermore, the court in its instructions to the jury told them if and only if they found petitioner guilty then they should consider the charge against Cannella (R. 311-312). The giving of this charge rendered nugatory the effect, if any, of the court's statement that Cannella's confession and admissions were to be considered only against Cannella. The jury was entitled to find each defendant guilty or not guilty under the evidence admitted as to that defendant. The strongest evidence of guilt was Cannella's own confession. In the absence of this instruction, the jury may have found Cannella guilty and petitioner not guilty, differentiating between the two because of the Cannella

statements. But, the court linked Cannella's conviction to that of petitioner and as a result Cannella's confession and damaging admissions assisted in convicting petitioner. Although Cannella was not linked in the instructions to petitioner in Count three, and was not charged under Count three, a finding of guilt under the other counts would similarly lead the jury to a conviction under this count.[5]

4. The trial judge instructed the jury that a witness may be impeached by showing that he has been convicted of a felony and "if you find from the evidence that the credibility of a witness has been impeached, you are at liberty to disregard the entire testimony of that witness, unless such testimony has been corroborated by other evidence" (R. 317). Both defendants had been convicted of felonies and both testified as witnesses. By this instruction the court told the jury in effect that since both defendants had been convicted of felonies and since both had testified that their convictions constituted impeachment and the jury was at liberty to disregard the entire testimony of both defendants unless such testimony had been corroborated by other evidence.

In every prosecution under the Federal Fire Arms Act, there will be evidence that the defendant has been convicted of a felony. The giving of this instruction will render it difficult for a defendant to be acquitted if he chooses to testify. This instruction is therefore subject to the same vice that condemned the presumption in Section 2 (f) of the Federal Fire Arms Act, 29 U. S. C. 902 (f) in

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[5] In *United States v. Klass*, 3 Cir., 166 F. (2d) 373, 380-381, it was held to be error to charge a jury that they could find an alleged aider and abettor guilty only if they found the principal guilty because of the assertion of interrelationship of guilt from which the jury might conclude that to convict any it had to convict all. In the instant case by so charging on the interrelationship of guilt, the jury would have concluded that in order to convict Cannella they had to convict Costello.

Tot v. United States, 319 U. S. 463. This court in holding the presumption section invalid and stated (319 U. S. at 470): "Even if the presumption question were in itself reasonable, we think that the nature of the offense, and the elements which go to constitute it, render it impossible to sustain the statute, for the reason that one element of the offense is the prior conviction of a crime of violence. If the presumption warrants conviction unless the defendant comes forward with evidence in explanation and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted, **the defendant is under the handicap, if he takes the witness stand, of admitting prior convictions of violent crimes. His evidence as to acquisition of the firearm or ammunition is thus discredited in the eyes of the jury before it is given.**"

And it was error to charge the jury that they were at liberty to disregard the testimony of petitioners unless such testimony was corroborated as it is the jury's function to weigh the evidence and the credibility of the witnesses. See **United States v. Michener**, 3 Cir., 152 F. (2d) 880, 884; Cf. **Hicks v. United States**, 150 U. S. 442; **Williams v. United States**, 9 Cir., 93 F. (2d) 685.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15,800

Joseph Costello, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 15,801

Joseph John Cannella, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 20, 1958.]

Morris A. Shenker and Sidney M. Glazer for Appellant Joseph Costello.

Norman S. London (Mark M. Hennelly was with him on the brief) for Appellant Joseph John Cannella.

Forrest Boecker, Assistant United States Attorney (Harry Richards, United States Attorney, was with him on the brief) for Appellee.

Before SANBORN, WOODROUGH, and JOHNSEN, Circuit Judges.

WOODROUGH, Circuit Judge.

Joseph Costello and Joseph John Cannella prosecute these separate appeals from convictions upon jury verdicts for violating the Federal Fire Arms Act, to-wit: Sections 902(e) and 902(f), Title 15, U.S.C.A., and conspiracy to violate said sections.

Section 902(e) makes it "unlawful for any person * * * who has been convicted of a crime of violence * * * [including burglary, Section 901(6)] to * * * transport or cause to be * * * transported in interstate commerce * * * any firearm * * *." Section 902(f) makes it "unlawful for any person who has been convicted of a crime of violence [including burglary, Section 901(6)] to receive any firearm * * * which has been * * * transported in interstate * * * commerce * * *."

Each of the first two counts of the indictment charged the transportation of a described firearm in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, by both defendants and that one of them, namely, Costello, had prior thereto been convicted of a crime of violence, to-wit: the crime of burglary in the Circuit Court of St. Francois County, Missouri. The third count charged against Costello alone that he unlawfully received a described firearm which had been transported in interstate commerce, having prior thereto been convicted of the said crime of violence. The fourth count charged both defendants with conspiracy to commit both offenses by transporting and causing to be transported in interstate commerce the described revolvers from Granite City, Illinois, to St. Louis, Missouri, and having Costello receive one of them, Costello having been convicted of the crime of violence prior to the inception of the conspiracy. The overt act charged was that Costello obtained several of the described revolvers from one Earl Lewis in Granite City, Illinois.

There was substantial evidence: that Costello lived in St. Louis, Missouri, and was the officer in charge of the Ace Cab Company in that city and Cannella, who also lived there, was in the employ of the Company as a supervisor and cab driver; that they were closely associated during the relevant period; that Costello had been convicted of burglary in St. Francois County, Missouri, in 1936; that Costello made inquiry of a witness, Harry Arnold, about getting a 38 caliber Smith and Wesson Terrior model revolver and was referred to Earl Lewis, a licensed gun dealer in Granite City, Illinois; that Costello and his co-defendant Cannella together went to the gun shop of Earl Lewis and were there shown and talked about "guns". (throughout the trial the words "gun" and "revolver" were used as synonymous); and that Cannella came to the shop alone and ordered three guns which Earl Lewis undertook to obtain for him. He left a note with Lewis containing the telephone number of the Ace Cab Company where Lewis could reach him under the name of "Joe". When the guns had been delivered to Lewis he telephoned the Ace Cab Company and asked for "Joe", "the Joe that knew Earl Lewis" [both appellants are named Joe] and informed the Joe who answered that he had the guns. Cannella then went and got the three guns described as Smith and Wesson Chief Special 38 Caliber, numbered 65965, 69436, and 68897 respectively, which were identified without dispute and received in evidence at the trial. Cannella paid about one hundred and eighty dollars for them and signed the false name of Joe Overbeck as purchaser in the gun dealer's register together with a false address. One of the guns marked exhibit 6 was subsequently found, fully loaded, in the locked glove compartment of the automobile driven by Costello when he was arrested. The compartment was opened with a key which was in Costello's possession at the time of his arrest, although Costello denied having a key for the compartment.

Cannella made a statement to the F.B.I. officers in writing and signed by him to the effect that he bought the guns at the gun shop of Earl Lewis in Granite City, Illinois; transported them in interstate commerce from Illinois to Costello's Ace Cab Company office in St. Louis, Missouri, and delivered them to Costello; all at the direction of Costello; and that the money for the purchase was furnished him by Costello. He also testified before the grand jury, which returned the indictment herein, as to his intimate association with Costello and his knowledge of Costello's former conviction of law violation and imprisonment. Both defendants plead not guilty, testified in their own behalf on the trial, and denied the charges against them. Further details of the evidence will be brought out in our discussion of the points argued by the appellants, respectively, for reversal. Each appellant is represented by his own able counsel as he was on the trial.

Appellant Costello's contentions for reversal are summarized as follows: that the court erred (1) in treating the crime of burglary for which he was convicted in 1936 as the "crime of violence" defined as "burglary" in Section 901 (6) of the Fire Arms Act; (2) in refusing to suppress the revolver obtained by illegal search of his car by St. Louis Police officers and receiving their testimony in evidence; (3) in denying him a separate trial; (4) in refusing to require production for inspection of all of Cannella's testimony before the grand jury; (5) in admitting testimony given by Cannella to the grand jury on April 23, 1957; (6) in allowing the government to cross examine and impeach witnesses called by it; (7) in refusing to grant a mistrial on account of certain incidents at the trial; (8) in instructions given and refused; and (9) in denying Costello's motion for acquittal at the close of the evidence for insufficiency of the evidence.

Appellant Cannella presents all of the contentions for reversal of his conviction that are argued on behalf of

Costello—each appellant from his own angle—and also stresses that the court erred in refusing to dismiss the case against him; (1) on account of his lack of knowledge of Costello's conviction of a crime of violence if such there was; (2) on account of his compelled appearance before the grand jury; and (3) because the court erred in admitting into evidence his oral and written statements to the F.B.I. agents.

Opinion as to Costello.

1. The prior judgment of conviction entered against Costello in St. Francois County, Missouri, in 1935, recited that he was found guilty of burglary and larceny "as charged in the information" and the information referred to (offered by defendants and excluded) charged that on or about the 26th day of May, 1935, Costello feloniously and burglariously did forceably break into and enter a certain jewelry store with intent to steal certain described jewelry therein and did steal it.

Costello contends that the word burglary used in Section 901 (6) must be given the meaning it had at common law and in any event does not include the crime Costello was shown to have committed in 1936. Burglary at common law "is the breaking and entering in the night time of another's dwelling house with intent to commit a felony therein." 9 Am. Jur. Burglary, Section 1, page 239; 23 A.L.R. 288.

The contention is not without weight as the Supreme Court has declared "that where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." *United States* v. *Turley*, 352 U.S. 407, 411-412. But the Court in the same opinion declared that although criminal statutes are to be construed strictly "this does not mean that every criminal

statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." It is appropriate to consider the purpose of the Act.

The Act here involved was passed in 1938 and by that time the law against burglary in practically all the states, certainly in all the states of this circuit, had developed so as to include not only common law burglary, but also the acts charged and adjudged against Costello as constituting burglary in this case. 23 A.L.R. 288. The sections of the Fire Arms Act in question were directed against persons who had been convicted of "crimes of violence" and the reason for including burglary in the definition was that burglary has always been and now is universally so regarded. It is unreasonable to infer that Congress intended the word burglary as used in Section 901 (6) to be given the restricted meaning that it had at common law. Counsel has argued that if the term burglary in the section be not governed by the common law definition, any state legislation calling a traffic offense by the name of burglary would bring it within the federal statute. But as stated by the Court of Appeals for the First Circuit in *Cases* v. *United States*, 131 F.2d 916, 924; "It does not seem to us that there can be a sufficiently wide variety in the definition in the different states and territories of the crimes listed to make this classification unconstitutional [as discriminatory]."

But if in some cases an instance should be presented where state legislation defines as burglary some offense that is not a crime of violence, a question may be presented that is not here involved.

The question raised for the appellants as to the meaning to be given "burglary" was considered by the District Court of Colorado in *United States* v. *Kelly*, 146 F.Supp. 747. The defendant there tried under the Fire Arms Act, had been previously convicted like Costello of so called

second degree burglary under the Missouri statute. We quote with approval the following observations the court made when considering the motion for judgment of acquittal:

> "It would be a strange holding indeed for this court to say that it was the intent of Congress that one having been convicted of burglary by breaking into a building other than a dwelling house at a time other than between sunset and sunrise is more fit to have in his possession a firearm than one whose nefarious activities have been limited to dwelling houses at night.
>
> * * * * * * *
>
> "Moreover, in the opinion of the court, on the face of the statute, Congress showed its intention that the designated crimes of violence were to take their meaning from the statutes of the states where the conviction was had. Following the description of certain crimes of violence, Section 901(6) of 15 U.S.C.A., concludes by setting forth,
>
> > 'or assault with intent to commit any offense punishable by imprisonment for more than one year.'
>
> "Can it be said that 'any offense' means 'any offense at common law?' The answer has to be in the negative for the term 'any offense' is limited by the minimum imprisonment meted out for the assault to commit such offense, and this must be governed by state law, for the punishment at common law for assaults with intent to commit felonies 'varied according to the discretion of the court.' Wharton, Criminal Law, 12th ed. § 840, p. 1126." 146 F. Supp. 747, 752-753.

Compare *Braswell* v. *United States*, 10th Cir., 224 F.2d 706, where the defendant, accused under the Fire Arms Act had been convicted of burglary in a Texas court. In

Texas as in Missouri, burglary includes daytime breaking and entering of buildings other than dwellings, but the record of the case indicates that the Court of Appeals for the Tenth Circuit was not even called on to consider the question argued here. It affirmed conviction.

No error is found here in the rulings to the effect that the "burglary" on account of which Costello was charged and convicted in 1935 was "burglary" within the Fire Arms Act.

2. Costello was arrested by St. Louis Police Officers and taken to the city jail where he was searched and questioned and discharged. The Cadillac car which he was driving when arrested was also searched. He denied having a key to the glove compartment in the car, but the police officers found one of the keys taken from him fitted the glove compartment lock. The officers opened the compartment with the key and took possession of the revolver contained in it, which was shown to be the revolver described in the indictment as having been received by him. The arrest, search, and seizure were found to have been illegal under Missouri law in a proceeding in the Missouri State Court and it is not contended for the government that they were legal under the federal law. But it was not shown that any federal officer took part in the search and the court's refusal to suppress the gun and receiving it in evidence were sanctioned by the decision of this Court in *Jones* v. *United States*, 8 Cir., 217 F.2d 381, 382-383. Cf., *United States* v. *Benanti*, 2nd Cir., 244 F.2d 389, 392. The court's refusal to suppress the guns was without error.

3. This case presented the situation where one of the two defendants had given a statement orally and in writing to agents of the F.B.I. before the indictment was found, concerning the transactions upon which the indictment was based, and the other defendant had not done so.

In pre-trial proceedings and commencing at the opening statement and on many occasions during and after the trial, and on this appeal, Costello, who had not made any statement, has earnestly and persistently contended that he was entitled to a severance and trial apart from Cannella.

But Rule 8(b), Federal Rules of Civil Procedure, 18 U.S.C.A., provides that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same transaction or in the same series of acts or transactions constituting the offenses charged. Under Rule 13 the court may order two or more indictments to be tried together if the offenses and the defendants could have been joined in a single indictment.

In this case the two defendants were closely associated in their work and otherwise. The charge against them in counts one and two, supported by the evidence, was that one defendant was an aider and abettor of the other in transporting the guns and therefore both were charged as principals. The fourth count was for conspiracy and guilty participation by both was necessary to convict either. It was necessary to show the acts of both defendants at the relevant times in order to obtain a realistic picture of the transactions involved. It is true that in trying them together the statement made by the one who had made it after the acts was hearsay and not probative of guilt as to the other, but the record in this case shows that the law to that effect was stated to and impressed upon the jury by the court and by each and all attorneys participating in the trial literally scores of times.

The ultimate question whether or not Costello aided and abetted Cannella in transporting the guns or whether they conspired to transport them or to have Costello receive them was not of such complicated nature that the evidence against each could not be separately considered as to each.

It is firmly settled for this Court that "the mere fact that admissions have been made by one [defendant] which are not evidence against the other is not a conclusive ground for ordering the parties to be tried separately." *Kansas City Star Co.* v. *United States,* 8 Cir., 240 F.2d 643, 652; In *Opper* v. *United States,* 348 U.S. 84, 95, the Supreme Court said:

> "* * * The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial."

We find no error requiring reversal because of the joint trial of the defendants.

4 & 5. The evidence was that Cannella first gave statements to agents of the F.B.I. on April 10, 1956, and was first called before the grand jury to testify on April 18, 1956. The Assistant United States Attorney in the Eastern District of Missouri, Forrest Boecker, testified that on April 17, 1956, he had caused an indictment to be drawn up charging Costello alone with the offenses later charged against the two defendants in counts one and two of the indictment. He put questions to Cannella on his first appearance before the grand jury but did not question him as a prospective defendant or have in mind that Cannella was implicated in the proposed charges against Costello. Mr. Boecker said that it was the view of the government at that time that [Cannella] was not an object of suspicion or a defendant. He said "it is a fair statement to say

that after I heard Cannella's testimony he was joined as a defendant." No evidence was adduced as to what Cannella testified to on April 18, 1956. He was subpoenaed again and testified before the grand jury on April 23, 1956. "He was warned [as to his constitutional rights] on April 23rd, but he was not warned when he appeared on April 18th." All the testimony he gave on the 23rd was made available to appellants. The prosecutor read part of it to the jury on the trial. The defendants read substantially all the rest but the court refused to compel the government to produce for inspection a copy of his testimony at his first appearance.

The ground on which the production was resisted was that there was no showing of cause to invade the secrecy of the grand jury in respect to it. In cases of alleged perjury before a grand jury a transcript of an accused's testimony there given must be made available, but no such charge was here involved. A trial court unquestionably had the power under Rule 6(e) of the Federal Rules of Civil Procedure, 18 U.S.C.A., to order the grand jury proceedings transcribed and produced. Such power should be exercised only where there is a clear showing that the ends of justice require it. *Lawn* v. *United States,* 355 U.S. 339, 362; *Herzog* v. *United States,* 9th Cir., 226 F.2d 561, 566. No such showing was made here and we find no prejudice to either defendant resulting from the court's refusal to compel the production and no error.

On the other hand the government offered and the court received statements which Cannella voluntarily made to the grand jury on his second appearance after he had been warned of his rights, to the effect that he had knowledge of Costello's prior conviction of a crime. His knowledge was not derived from seeing the record, but in his employment under and association with Costello he had heard it talked about and "it had been published in the newspaper". It is argued that "Costello was damaged by this

evidence because it showed that [because of the way Cannella had become informed] Costello had an ill name with his neighbors" and therefore "it opened the issue of his bad character". But whether or not Cannella knew of Costello's prior conviction was an essential element of the charge of the indictment to be inquired into and established. It was not error to receive evidence competent to prove a charge against the defendant because it may also prove more against him than he is charged with. We do not sustain either of the points we have numbered (4) and (5).

6. As to the complaint that the prosecutor was permitted to cross examine and impeach witnesses whom he had called, it appeared that the government witnesses Goldstein and David Cannella each testified contrary to a statement he had given to the government. When that developed the court permitted the government to interrogate the witnesses respectively concerning their former statements. The witness Goldstein also claimed in effect that government officers had wrongfully taken him from his home to the grand jury without opportunity to either dress himself or communicate and subjected him to wrongful coercion. The court permitted the officers concerned to testify in rebuttal to their serving of the subpoena upon Goldstein in ordinary and proper course. We do not find that the court abused its discretion either in permitting the questioning of the hostile witnesses - - - See and Compare *Meeks* v. *United States*, 9th Cir., 179 F.2d 319; *Carrado* v. *United States*, D.C. Cir., 210 F.2d 712, cert. den. 347 U.S. 1018; *United States* v. *Graham*, 2nd Cir., 102 F.2d 436, cert. den. 307 U.S. 643; *Moomaw* v. *United States*, 5th Cir., 220 F.2d 589; *Doto* v. *United States*, D.C. Cir., 223 F.2d 309, cert. den. 350 U.S. 847 - - - or in introducing the impeaching testimony which tended to protect the dignity of the court officers. *State* v. *Sharp*, 138 S.C. 58, 135 S.E., 635; *People* v. *Gross*, 230 Mich. 653, 203 N.W. 534; *Martin*

v. *State*, 80 Texas Cr. 199, 189 S.W. 264; *Caldwell* v. *State*, 82 Ga. App. 480, 61 S.E.2d 543; *Commonwealth* v. *Cohan*, 307 Mass. 179, 29 N.E.2d 693; *Tice* v. *State*, Okla. 283 P.2d 872.

7. Complaint is made of three instances during the trial when the court either in voicing its own reaction or in sustaining objections by the prosecution spoke somewhat sternly to defendant's counsel. The defense of the cases was carried on with earnestness, zeal, and skill by able counsel and we have not failed to fully consider the contention that the court's remarks were unfair and unjust. We think the colloquies complained of were not sufficiently important to merit repetition and we conclude that the defendants were in no wise deprived of the effective assistance of their counsel by any improper action towards them or statements by the court to them. *Goldstein* v. *United States*, 8th Cir., 63 F.2d 609, 613. On the contrary, the trial was conducted with fairness and dignity.

8. As to instructions given and refused. After instructing that Costello could be found guilty on the first count only on finding that he had requested and directed Cannella to transport the gun in interstate commerce, Costello having theretofore been convicted of burglary, the court then instructed that Cannella could be convicted upon that count only if Costello was found guilty thereon. It is argued that the instruction containing "an assertion of interrelationship of guilt" was erroneous under the decision in *United States* v. *Klass*, 3rd Cir., 166 F.2d 373, 380. The contention is without merit. In this case commission of the crime charged in the count was dependent, as the court charged, upon its having been instigated by the ex-convict, Costello. If any element of guilt on Costello's part was lacking Cannella could not be convicted.

The court instructed upon the credibility of impeached witnesses that the jury "may accept such portions of testi-

mony of such witnesses who has been impeached or who has knowingly testified falsely as you believe to be true and credible" and also that if either of the defendants made statements to investigating officers regarding the matter under inquiry and pertinent to the inquiry contrary to proven fact and did so willingly and with knowledge of the falsity "you are at liberty to consider that circumstance as evidence of that defendant's guilty conscience."

The instructions as a whole which were given as to credibility of witnesses were reasonable and proper.

The court did not read to the jury the statute under which the indictment was laid, but the court stated all the elements necessary to a finding of guilty. That was fully sufficient in the case of a crime of such few and simple elements as was here involved. *Holland* v. *United States,* 10th Cir., 209 F.2d 516, aff'd. 348 U.S. 121; *United States* v. *Heine,* 2nd Cir., 149 F.2d 485, cert. den. 325 U.S. 885; *United States* v. *Capitol Meats,* 2nd Cir., 166 F.2d 537, cert. den. 334 U.S. 812; *Lewis* v. *United States,* 10th Cir., 49 F.2d 272.

The court gave the jury what has been referred to as the "Allen instruction" in which the jury was urged to try to agree upon a verdict and we find no error in giving the instruction. *Allen* v. *United States,* 164 U.S. 492; *United States* v. *Wright,* 8th Cir., 175 F.2d 384, cert. den. 388 U.S. 873; *Nick* v. *United States,* 8th Cir., 122 F.2d 660, cert. den. 314 U.S. 687; *Bowen* v. *United States,* 8th Cir., 153 F.2d 747, cert. den. 328 U.S. 747.

In addition to his contention that he had not been convicted of "burglary" within the Act, Costello also contended on his motion for instructed verdict that there was insufficiency of the evidence that he in any way participated in the purchase of the guns. We think the competent circumstantial evidence as outlined herein required submission of that question to the jury.

Opinion as to Cannella.

Cannella was interrogated by F.B.I. agents and made a voluntary statement to them as follows:

"I, JOSEPH JOHN CANNELLA, make the following voluntary signed statement to Special Agents Herbert K. Moss and Earl C. Porter, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I have been advised that I do not have to give a statement and that any statement I do make may be used against me in a court of law. No threat or promise of reward have been made to me in order to get me to give this signed statement. I have been advised of my right to consult with an attorney prior to furnishing a statement. I was born April 12, 1915, at St. Louis, Missouri. I have been employed as an Ace Cab owner and supervisor for Ace Cab Company since about November, 1953. I presently reside at 4713 Hatz, Northwoods, Missouri. About the first part of December, 1955, Joseph Costello said to me at the Ace lot 'Let's take a ride to Granite City, Illinois', and Costello and myself then drove in Costello's Cadillac automobile to Granite City, Illinois. Upon arrival in the vicinity of Granite City, Costello said, 'We have to look around for a gun shop'. However, Costello and I drove directly to Earl Lewis Gun Shop in Granite City, Illinois, in Costello's blue Cadillac convertible. This is the only stop we made. Upon arrival at the Earl Lewis Gun Shop in Granite City, Illinois, there was only one man present whom I know to be Earl Lewis, and he provided a catalogue of guns and Costello looked in the catalogue and picked out three guns from the catalogue and Costello told Lewis to order three guns for Costello and to call me when they arrived. I told him to call 'Joe, the supervisor', and to aid him in doing so I wrote the notation 'Joe, Main 1-8495'. Costello and I then returned to St. Louis, Missouri, and ap-

proximately a week later I received a radio call from the Ace Cab dispatcher requesting I call the Ace Cab office. I did call the Ace Cab office and a girl in the office told me to call a certain number. I did call this number and it was Earl Lewis. He advised me the guns that Costello had ordered had arrived. I then had the Ace Cab office tell Joe Costello that the guns had arrived at Lewis Gun Shop at which time Costello gave me $180. in cash, and I proceeded to the Earl Lewis Gun Shop, Granite City, Illinois, and upon arrival was advised by Lewis that the guns were not the exact type as ordered by Costello. From the Earl Lewis Gun Shop I then called Costello and he told me if the guns were not as he had ordered for me not to accept them. I did not accept these guns, and returned to St. Louis. Upon arrival at the Ace Cab lot I offered the $180 to Costello which $180 he had originally provided me to buy the three guns, at which time Costello directed me to put the $180 in an envelope and give to Joe Muth, and have Muth put the envelope containing the money in the office safe at the Ace Cab office, which I did. About one week thereafter I again received a radio call from the radio dispatcher of the Ace Cab Company advising me to call the Ace Cab office, which I did. Some girl in the office advised me to call a certain number, which I did, which was the Earl Lewis Gun Shop, Granite City, Illinois. Lewis told me the guns that Costello had originally ordered had arrived. I then told Joe Muth that I wanted the envelope out of the office safe, which he gave me, and on the same date I made the telephone call to Lewis I proceeded to the Earl Lewis Gun Shop, Lewis gave me the three guns which Costello had originally ordered, and I gave Lewis $180 as a purchase price for these three guns, and Lewis gave me some change, exact amount not recalled by me. However, it was only a few dollars, as I recall that the purchase price for each gun was approximately

> $59. This was the sum of $180 that Joe Costello had originally given to me as a purchase price for these guns as referred to above. Before departing from Lewis Gun Shop I signed the name 'Joe Overbeck, 4186 Kingshighway', city and state not shown, as a purchaser for these guns. I then returned to the Ace Cab lot, St. Louis, Missouri, with the three guns in the cartons, took them in and placed them on a desk in Joe Costello's private office. In my presence Costello opened the cartons and looked at the guns. I have not seen these guns since delivering them to Costello in his private office. Sometime later, on the day or the day after Costello was arrested by the St. Louis Police Department in early 1956 * * *. Special Agent Porter has exhibited to me a longhand entry dated December 22, 1955, in the name 'Joe Overbeck, 4186 Kingshighway'. I wish to state that this is my handwriting. Also Mr. Porter has exhibited to me a note 'Joe, Main 1-8495', which I state is likewise in my handwriting. I provided this note with the name 'Joe' to Earl Lewis on my first visit to Lewis Gun Shop. The entry 'Joe Overbeck, 4186 Kingshighway' was made by me when I received the three above-mentioned guns from Lewis."

Other statements made to the agents by Cannella before he made the above were checked as to veracity by the agents in his presence by telephone and discredited. Thereupon he gave the above account, which he said was the truth and at the conclusion of it he said he was fearful that it would come to Costello's attention that he had provided the information and "he did not think his life would be worth a nickel." He began rubbing his hands over his forehead and said "My God, My God, what is going to happen to me" and he became ill.

(1) It is strenuously argued for both defendants that the court erred in receiving the testimony of the agents

concerning Cannella's conduct and exclamations at the time he gave them his statement. The circumstances bore not only upon the admissibility of Cannella's statement against his interest but also upon its credibility. It was a voluntary statement freely made and there was no error in receiving it in evidence together with the testimony as to the circumstances surrounding the giving of it.

(2) The government offered in evidence and the court received the testimony which Cannella gave to the grand jury at his second appearance before it on April 23rd, concerning his knowledge of Costello's criminal record. Cannella had been duly warned of his rights and gave the testimony voluntarily. Both as a witness before the grand jury and as a witness in his own behalf at the trial he denied knowing the specific crime for which Costello had been convicted in 1935. The court instructed and it is conceded that Cannella could not be convicted unless "he knew that Costello had been convicted of burglary as charged in the indictment". The government "submits that such knowledge was imputed to [Cannella] by circumstantial evidence and by [his] partial admission". He admitted before the grand jury that he knew Costello was reputed to have a criminal record and that he had been in prison and when he obtained the guns (he said for Costello, with money supplied by Costello) he signed a fictitious name on the dealer's register and gave a false address. When he was first interrogated by the F.B.I. agents he gave a false account of the transaction and when he changed his story and involved Costello he evinced a guilty conscience and fear of consequences.

We are not cited to precedents as to the degree of proof of knowledge of the principal's prior crime that is required to support conviction of an aider and abettor under the sections of the Act here involved. We think the situation is comparable to cases where the accusation is that of

receiving stolen goods knowing them to have been stolen. It has long been settled that such knowledge may be imputed beyond reasonable doubt by circumstantial evidence.

> "The requisite guilty knowledge need not be actual, direct, positive, or absolute, but may be constructive, implied, or circumstantial. It is not essential to a conviction that the requisite guilty knowledge that the goods were stolen should be actual, direct or positive and absolute, such, for instance, as knowledge acquired by having personally witnessed or observed the theft, or by information of the theft from persons who had personal knowledge, such as eye witnesses or the person from whom the goods were received; the requisite knowledge may be circumstantial or deductive, and constructive or implied knowledge through notice of facts and circumstances from which guilty knowledge may be fairly inferred satisfies the requirements as to knowledge. 76 Corpus Juris Sec. Section 8, p. 12."

In this case Cannella's admission that he knew that Costello had a criminal record and had been imprisoned for crime, coupled with his conduct in giving a false name and address to the gun dealer and his attempt to cover up Costello's connection with the purchase and transportation of the guns by false statements to the officers, constitute circumstantial evidence of his guilty knowledge sufficient to support the verdict of the jury on the issue.

Each of the assignments of error that have been discussed in relation to Costello have also been carefully considered in respect to Cannella, but we find the conviction of Cannella was without error.

Although some further points have been argued and have been fully considered, they lack merit and have not required discussion.

Both Costello and Cannella were accorded a fair trial and the convictions and sentences of thirty months as to Costello and eighteen months as to Cannella are affirmed.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment in Cause No. 15800.)

United States Court of Appeals for the Eighth Circuit.

No. 15800. September Term, 1957.
Tuesday, May 20, 1958.

Joseph Costello, Appellant,
vs.
United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Joseph Costello, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

May 20th, 1958.

No. 224

LIBRARY
SUPREME COURT. U. S.

JUL 26 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 224

JOSEPH JOHN CANNELLA,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. .....

JOSEPH JOHN CANNELLA,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on May 20, 1958.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, p. 15), is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 20, 1958 (Appendix, infra, p. 34). A timely petition for rehearing was filed, and this petition was overruled on June 27, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether admissions obtained from a "de facto" defendant called before the grand jury for the purpose of obtaining evidence for use against him at the trial are admissible into evidence and whether testimony may be taken from a person before a grand jury after it has been decided to seek an indictment against him where the person is not advised that he is a "de facto" defendant, without violating the self-incrimination clause of the Fifth Amendment and the assistance of counsel clause of the Sixth Amendment.

(2) Whether the Federal Firearms Act which prohibits the interstate transportation and receipt of firearms by any person who has been convicted of a crime of violence defined by the act to include "burglary", prohibits the transportation and receipt of firearms by a person who has been convicted under a state second degree burglary statute of breaking and entering a jewelry store with intent to steal.

(3) Whether it was error to refuse to require production for inspection of all of petitioner's testimony before the grand jury where part of his testimony was introduced and used as evidence against him at his trial.

(4) Whether evidence obtained by state officers in a search and seizure found to be illegal in a proceeding in a state court of a state which follows the rule of exclusion is admissible in federal court despite the Fourth Amend-

ment and the standards for the enforcement of federal criminal statutes in federal courts.

(5) Whether, in a prosecution for the interstate transportation of a firearm by a person who has been convicted of a crime of violence, it is error to instruct the jury relative to the testimony of the defendants as witnesses that after a witness is impeached by showing a felony conviction the entire testimony of an impeached witness may be disregarded.

(6) Whether, in a prosecution for the interstate transportation of firearms by any person who has been convicted of a crime of violence and conspiracy to commit that substantive offense, petitioner's knowledge that his co-defendant was reputed to have a criminal record and had been in prison is sufficient to support his conviction as an aider and abettor and a conspirator.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Federal Firearms Act, § 1, 15 U. S. C. 901, provides in part as follows:

Definitions

As used in this chapter——

* * * * * * *

(6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, robbery, burglary, housebre[illegible]ng; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

* * * * * * * * *

Federal Firearms Act, § 2, 15 U. S. C. 902, provides in part as follows:

* * * * * * *

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter.

* * * * * * * *

Amendment 4 of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effect against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * * * * *

Amendment 5 of the United States Constitution provides in part:

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

* * * * * * * *

Amendment 6 of the United States Constitution provides in part:

In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

STATEMENT.

This is a companion case to Joseph Costello v. United States, now pending before this Court. Petitioner was convicted by a jury on counts 1, 2 and 4 of a four count indictment which charged in the first two counts that he and Joseph Costello transported a described firearm in interstate commerce subsequent to a conviction of Costello of a "crime of violence" described as burglary. The fourth Count charged both defendants with conspiracy to commit the substantive crimes charged (R. 1-3).

The evidence on behalf of the government may be summarized as follows:

Petitioner was a supervisor and cab driver of a cab company in St. Louis, Missouri, and Costello was its principal officer. In 1955 petitioner and Costello went to the shop of a gun dealer in Illinois and talked about guns. Later petitioner ordered three guns, which he obtained, signing the name of Joe Overbeck in the dealer's register (R. 104-109). These guns were transported to Missouri. One of them was found in Costello's car (R. 138), another was sold to a tavern operator (R. 114-155), and the third was not the subject of an indictment count (R. 124).

Costello had been convicted in a Missouri State Court in 1936 under an information which charged that he did break and enter a certain jewelry store with intent to steal, and this was the conviction relied upon by the government to constitute "burglary" and a "crime of violence" within the meaning of the statute (R. 59-60, 266-270). In order to prove that petitioner had knowledge of this conviction, the government introduced testimony of petitioner before the federal grand jury on April 23, 1956, to the effect that petitioner knew Costello had the reputation of having a

criminal record (R. 80, 92-93). Petitioner objected to the introduction of his grand jury testimony at the trial (R. 76, 79-80), by a pre-trial motion to suppress evidence (R. 7-8) and a motion to dismiss the indictment (R. 6) on the ground that petitioner was called before the grand jury at a time when he was a "de facto" defendant for the purpose of compelling him to give testimony against himself without being advised that he himself was under investigation. Petitioner had also testified before the grand jury on April 18, 1958. Initially the Assistant United States Attorney had drawn up an indictment against Costello alone (R. 18, 20, 22-25). But after hearing petitioner's testimony on April 18, the Assistant United States Attorney joined him as a defendant (R. 26) and recalled him for further testimony on April 23 (R. 18, 91-184), with the admonition that "Mr. Cannella, I believe I should tell you that you are not required to make any statement here that might tend to incriminate you, you understand that" (R. 19, 78, 92). Petitioner and Costello were indicted on that date (R. 1). The Court denied petitioner's motion to require the government to furnish him a copy of his testimony on April 18 (R. 76-78).

Costello was arrested by St. Louis Police Officers who later found one of the guns involved in his automobile on searching it at police headquarters (R. 12-14). The arrest, search and seizure was found to have been illegal under Missouri Law in a criminal case against Costello arising out of his arrest (R. 34-36).

Petitioner testified that he alone had purchased the firearms, that he had borrowed Costello's automobile and had left one of the firearms involved in the glove compartment (R. 210-214). Petitioner himself had been convicted of the crime of selling intoxicating liquor without a license (R. 281-282).

The trial judge, in its instructions to the jury, stated that a witness may be impeached by showing that he has been convicted of a felony and told the jury that if it found the "credibility of a witness has been impeached, you are at liberty to disregard the entire testimony of that witness, unless such testimony has been corroborated by other evidence" (R. 317).

The court below affirmed the conviction and found in regard to petitioner's compelled appearance before the grand jury on April 23 that petitioner had been duly warned of his rights and gave his testimony voluntarily. The court noted that in regard to his appearance on April 18, 1956, the Assistant United States Attorney stated "it is a fair statement to say that after I heard Cannella's testimony he was joined as a defendant." In regard to the request for production of petitioner's testimony before the grand jury on April 18, 1956, the court found that the ends of justice did not require the invasion of the secrecy of the grand jury. The court found that Costello's prior conviction was "burglary" within the meaning of the Federal Fire Arms Act because Congress did not intend to give that crime the meaning it had at common law. No error was found in the admission into evidence of the gun found in Costello's glove compartment because no federal officer was shown to have participated in the search. The court also concluded that petitioner's knowledge that his co-defendant was reputed to have a criminal record and his signing of a false name in the gun register were sufficient to support his conviction as an aider and abettor and a conspirator. The instructions which were given as to credibility of witnesses were found to be reasonable and proper.

REASONS FOR GRANTING THE WRI

1. This is manifestly a case involving the calling of a "de facto" defendant before a Grand Jury for the purpose of obtaining damaging admissions. An important issue is presented as to what testimony may be taken from a person after it has been decided to seek an indictment against him as well as what use may be made of Grand Jury testimony where a witness marked for prosecution has not been informed that an indictment will be brought against him after he testifies.

Petitioner was subpoenaed to appear before the federal grand jury on two separate occasions, April 18, 1956, and on April 23, 1956 (R. 18, 24, 26). The Assistant United States Attorney stated that at the time of his first appearance petitioner was not a potential defendant, but that after hearing his testimony on this first occasion that he was so considered (R. 24, 26). In oral argument before the Court below, the Assisfant United States Attorney conceded that an indictment naming petitioner as a co-defendant had been drafted prior to the second appearance. Petitioner was admonished upon his second appearance that he was not required to make any statement that might tend to incriminate him but was not told that he was a "de facto" defendant (R. 19, 78, 92). The indictment was returned on this very day (R. 1). During this second appearance petitioner gave testimony which was subsequently introduced over objection in the trial of this cause in an attempt to show the requisite knowledge on his part that Costello had been convicted of a "crime of violence" (R. 76-81). It is indeed evident that he was brought before the grand jury for the very purpose of securing this evidence against him. In connection with his compelled appearance before the grand jury petitioner Cannella urged the trial court to suppress as evidence all evidence obtained directly or in-

directly from his testimony before the grand jury and sought a dismissal of the indictment (R. 6-8). He also objected to the introduction of his grand jury testimony at the trial (R. 75-80).

Certainly on some occasions a witness may be called before a grand jury and it will subsequently be determined that he should be made a defendant in the matter under investigation. It is not petitioner's contention however that the mere appearance of a defendant before a grand jury as a witness is sufficient to warrant the suppression of his testimony or to grant the person immunity from prosecution but it is petitioner's position that once it becomes known that a person is a prospective defendant he should not be compelled to appear or having appeared should be advised that he is being investigated. If a person is a "de facto" defendant then he should either not be called as a witness before the grand jury investigating him or if called he should be advised of his position so that he may intelligently determine whether or not to avail himself of his constitutional guarantees. A prospective defendant should not be brought before the grand jury for interrogation on the point for which he is being investigated. If he is allowed to be so interrogated then the warning required should not be merely an admonition that he need not give any incriminating statements, but should be a warning that he is considered to be a defendant and is himself under investigation. Only in this way can a witness before a grand jury be so advised of his status as to be capable of making the necessary decisions whether or not to answer any questions.

It has been recognized that it is a serious question whether or not a prospective defendant is subject to subpoena before the grand jury. This question was considered but not answered in **Powell v. United States**, D. C. Cir., 226 F. (2d) 269, 274, and **United States v. Scully**, 2

Cir., 225 F. (2d) 113. Cf. **United States v. Parker**, 7 Cir., 244 F. (2d) 943. In the **Scully** case the court found that the record did not show that the defendant was marked for prosecution but concluded that the practice of calling prospective defendants before the grand jury was highly questionable.

An individual charged with a crime is not compelled to give evidence against himself because of the protection of the Fifth Amendment. He is also entitled to the assistance of counsel under the Sixth Amendment. The procedure followed in the instant case constitutes a distinct threat to the preservation of these safeguards. The prosecutor now may simply delay the presentation of an indictment to the grand jury. He avoids telling the accused that he is to be indicted and compels him to appear before the grand jury by means of a subpoena. The accused, appearing without the assistance and presence of counsel, and unaware of intended action against himself, is caught off guard and answers the questions propounded to him and his admissions are then introduced in evidence against him when he is brought to trial and used to make a submissible jury case against him.

It is clear that petitioner's rights were violated when he was called before the grand jury that was investigating him and interrogated about the very offenses for which he was indicted on the very day he testified and when his testimony was used at the trial for the purpose of convicting him.

2. The argument concerning the question as to whether the term "burglary", included as a "crime of violence" in Section 1 (6) of the Federal Fire Arms Act, is broad enough to embrace a conviction for breaking and entering a jewelry store with intent to steal, second degree burglary under Missouri law, is set forth in the companion case of Joseph Costello v. United States, now pending before this

court on petition for writ of certiorari. Petitioner herein adopts the argument advanced in the Costello petition.

3. Prior to trial petitioner's motion to inspect his grand jury testimony was overruled (R. 9, 28). After the government introduced into evidence his testimony before the grand jury on April 23, 1956, petitioner's further request for the production of his testimony on April 18, 1956, was still denied (R. 61-62, 76-77). The testimony on April 23 did, in fact, refer to his testimony on April 18 (R. 75, 85, 88, 92, 102-103). It was necessary for the government to prove that petitioner had knowledge that his co-defendant had been convicted of a crime of violence. The evidence offered by the government to prove this fact was petitioner's grand jury testimony of April 23, 1956 to the effect that petitioner had heard that Costello had a criminal record and had been in prison. The testimony also showed that petitioner admitted that he went to the gun shop with Costello (R. 93, 95-96). Petitioner should have been allowed to inspect his prior grand jury testimony because it may have explained the portion of the testimony introduced by the government.

A defendant whose grand jury testimony is introduced into evidence is entitled to know what had gone before the critical testimony introduced since this might throw light on that testimony. This is the rule in perjury cases. **United States v. Remington,** 2 Cir., 191 F. 2d 246, 250. The production of this testimony is not dependent upon its admissibility at the trial. **Gordon v. United States,** 344 U. S. 414. In **United States v. Klock,** 2 Cir., 210 F. (2d) 215, the defendant was denied the right to inspect the remainder of his grand jury testimony after the government introduced a portion at the trial. The court held the error to be harmless because the portion introduced was not an essential element of the case and a complete contradiction of the portion introduced would not have consti-

tuted a defense. But, in the instant case, if the portion of petitioner's testimony introduced were not believed, there would be no basis for sustaining his conviction. Nor is the fact that grand jury proceedings are secret a valid basis for the denial of the right to inspect inasmuch as the government broke the veil of secrecy by introducing portions of the testimony. Cf. **United States v. Andolschek,** 2 Cir., 142 F. (2d) 503.

Petitioner should have granted the right to inspect his grand jury testimony prior to trial and the error was magnified by the denial of his motion to inspect after the government had introduced a portion thereof. Cf. **Jencks v. United States,** 353 U. S. 657. Certainly, if the other portion of his grand jury testimony had shown that he was of the impression that Costello had been confined in prison for an offense clearly not a crime of violence, it would have been competent evidence to explain the portion introduced. Without the right of inspection, petitioner was deprived of certain rights essential to his defense and as stated in the **Remington** case, supra, he is not required to rely upon his memory as to what transpired in the grand jury room.

4. The argument relative to the question as to whether evidence obtained by state officers in a search and seizure found to be illegal in a state court proceeding in a state which follows the rule of exclusion is admissible in federal court is set forth in Costello's petition and is adopted herein.

Petitioner had a sufficient interest in the guns found in Costello's car to challenge the unlawful character of the search and seizure. **United States v. Jeffers,** 342 U. S. 48.

5. Petitioner adopts the argument in the Costello petition on the question as to whether it is error, in a prosecution which has a prior conviction of a felony as an element of the offense, to instruct the jury after defendants testify,

that when a witness is impeached by showing a felony conviction, his entire testimony may be disregarded.

6. The evidence was insufficient to sustain petitioner's conviction because the government wholly failed to prove his knowledge of the fact that Costello had been previously convicted of a crime of violence. Petitioner was charged in Counts I and II as an aider and abettor and in Count IV as a conspirator (R. 1-3). It has been held that one cannot be an aider and abettor in the commission of a crime without knowledge of the crime. **Nye and Nissen v. United States,** 336 U. S. 613. Similarly, in a charge of conspiracy it must be shown that knowledge on the part of the accused is present. **Direct Sales Company v. United States,** 319 U. S. 703; **United States v. Falcone,** 311 U. S. 205.

The evidence offered to establish knowledge on the petitioner's part was his testimony before the Grand Jury on April 23, 1956 to the effect that petitioner knew that Costello had at one time been confined in prison (R. 78-80). He did not know for what reason Costello had been confined and had no knowledge of the nature of the charge of which he had been convicted (R. 80). Knowledge necessary in order to convict one as an aider and abettor or a conspirator under the instant charges must be knowledge of the fact that there existed a prior conviction of a crime of violence because the statute, specifically limits its application to those who have been convicted of a crime of violence. Knowledge that a person has been in jail is clearly insufficient as it is quite possible that it was the result of a conviction which is not specified by 15 U. S. C. A. 901 as a crime of violence. Therefore, mere knowledge of the fact of previous confinement is not equivalent to knowledge of the cause thereof, which is the critical factor in the statute under consideration. Conversely it is quite possible for one to have been convicted

of the crime of violence and yet never have been confined in any jail or prison. The fact that petitioner signed the name Joe Overbeck on the gun register is colorless to show that petitioner aided, abetted or conspired to commit a federal crime.

We are here concerned with a statute which specifically limits its application to persons who are members of a certain class, namely, those who have been convicted of a crime of violence as defined by the statute. Certainly then when this limited application is granted to those charged as principals, the same limitations must be placed upon charge against those accused merely as aiders and abettors or conspirators.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15,800

Joseph Costello, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 15,801

Joseph John Cannella, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 20, 1958.]

Morris A. Shenker and Sidney M. Glazer for Appellant Joseph Costello.

Norman S. London (Mark M. Hennelly was with him on the brief) for Appellant Joseph John Cannella.

Forrest Boecker, Assistant United States Attorney (Harry Richards, United States Attorney, was with him on the brief) for Appellee.

Before SANBORN, WOODROUGH, and JOHNSEN, Circuit Judges.

WOODROUGH, Circuit Judge.

Joseph Costello and Joseph John Cannella prosecute these separate appeals from convictions upon jury verdicts for violating the Federal Fire Arms Act, to-wit: Sections 902(e) and 902(f), Title 15, U.S.C.A., and conspiracy to violate said sections.

Section 902(e) makes it "unlawful for any person * * * who has been convicted of a crime of violence * * * [including burglary, Section 901(6)] to * * * transport or cause to be * * * transported in interstate commerce * * * any firearm * * *." Section 902(f) makes it "unlawful for any person who has been convicted of a crime of violence [including burglary, Section 901(6)] to receive any firearm * * * which has been * * * transported in interstate * * * commerce * * *."

Each of the first two counts of the indictment charged the transportation of a described firearm in interstate commerce from Granite City, Illinois, to St. Louis, Missouri, by both defendants and that one of them, namely, Costello, had prior thereto been convicted of a crime of violence, to-wit: the crime of burglary in the Circuit Court of St. Francois County, Missouri. The third count charged against Costello alone that he unlawfully received a described firearm which had been transported in interstate commerce, having prior thereto been convicted of the said crime of violence. The fourth count charged both defendants with conspiracy to commit both offenses by transporting and causing to be transported in interstate commerce the described revolvers from Granite City, Illinois, to St. Louis, Missouri, and having Costello receive one of them, Costello having been convicted of the crime of violence prior to the inception of the conspiracy. The overt act charged was that Costello obtained several of the described revolvers from one Earl Lewis in Granite City, Illinois.

There was substantial evidence: that Costello lived in St. Louis, Missouri, and was the officer in charge of the Ace Cab Company in that city and Cannella, who also lived there, was in the employ of the Company as a supervisor and cab driver; that they were closely associated during the relevant period; that Costello had been convicted of burglary in St. Francois County, Missouri, in 1936; that Costello made inquiry of a witness, Harry Arnold, about getting a .38 caliber Smith and Wesson Terrior model revolver and was referred to Earl Lewis, a licensed gun dealer in Granite City, Illinois; that Costello and his co-defendant Cannella together went to the gun shop of Earl Lewis and were there shown and talked about "guns". (throughout the trial the words "gun" and "revolver" were used as synonymous); and that Cannella came to the shop alone and ordered three guns which Earl Lewis undertook to obtain for him. He left a note with Lewis containing the telephone number of the Ace Cab Company where Lewis could reach him under the name of "Joe". When the guns had been delivered to Lewis he telephoned the Ace Cab Company and asked for "Joe", "the Joe that knew Earl Lewis" [both appellants are named Joe] and informed the Joe who answered that he had the guns. Cannella then went and got the three guns described as Smith and Wesson Chief Special 38 Caliber, numbered 65965, 69436, and 68897 respectively, which were identified without dispute and received in evidence at the trial. Cannella paid about one hundred and eighty dollars for them and signed the false name of Joe Overbeck as purchaser in the gun dealer's register together with a false address. One of the guns marked exhibit 6 was subsequently found, fully loaded, in the locked glove compartment of the automobile driven by Costello when he was arrested. The compartment was opened with a key which was in Costello's possession at the time of his arrest, although Costello denied having a key for the compartment.

Cannella made a statement to the F.B.I. officers in writing and signed by him to the effect that he bought the guns at the gun shop of Earl Lewis in Granite City, Illinois; transported them in interstate commerce from Illinois to Costello's Ace Cab Company office in St. Louis, Missouri, and delivered them to Costello; all at the direction of Costello; and that the money for the purchase was furnished him by Costello. He also testified before the grand jury, which returned the indictment herein, as to his intimate association with Costello and his knowledge of Costello's former conviction of law violation and imprisonment. Both defendants plead not guilty, testified in their own behalf on the trial, and denied the charges against them. Further details of the evidence will be brought out in our discussion of the points argued by the appellants, respectively, for reversal. Each appellant is represented by his own able counsel as he was on the trial.

Appellant Costello's contentions for reversal are summarized as follows: that the court erred (1) in treating the crime of burglary for which he was convicted in 1936 as the "crime of violence" defined as "burglary" in Section 901 (6) of the Fire Arms Act; (2) in refusing to suppress the revolver obtained by illegal search of his car by St. Louis Police officers and receiving their testimony in evidence; (3) in denying him a separate trial; (4) in refusing to require production for inspection of all of Cannella's testimony before the grand jury; (5) in admitting testimony given by Cannella to the grand jury on April 23, 1957; (6) in allowing the government to cross examine and impeach witnesses called by it; (7) in refusing to grant a mistrial on account of certain incidents at the trial; (8) in instructions given and refused; and (9) in denying Costello's motion for acquittal at the close of the evidence for insufficiency of the evidence.

Appellant Cannella presents all of the contentions for reversal of his conviction that are argued on behalf of

Costello—each appellant from his own angle—and also stresses that the court erred in refusing to dismiss the case against him; (1) on account of his lack of knowledge of Costello's conviction of a crime of violence if such there was; (2) on account of his compelled appearance before the grand jury; and (3) because the court erred in admitting into evidence his oral and written statements to the F.B.I. agents.

Opinion as to Costello.

1. The prior judgment of conviction entered against Costello in St. Francois County, Missouri, in 1935, recited that he was found guilty of burglary and larceny "as charged in the information" and the information referred to (offered by defendants and excluded) charged that on or about the 26th day of May, 1935, Costello feloniously and burglariously did forceably break into and enter a certain jewelry store with intent to steal certain described jewelry therein and did steal it.

Costello contends that the word burglary used in Section 901 (6) must be given the meaning it had at common law and in any event does not include the crime Costello was shown to have committed in 1936. Burglary at common law "is the breaking and entering in the night time of another's dwelling house with intent to commit a felony therein." 9 Am. Jur. Burglary, Section 1, page 239; 23 A.L.R. 288.

The contention is not without weight as the Supreme Court has declared "that where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning." *United States* v. *Turley*, 352 U.S. 407, 411-412. But the Court in the same opinion declared that although criminal statutes are to be construed strictly "this does not mean that every criminal

statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." It is appropriate to consider the purpose of the Act.

The Act here involved was passed in 1938 and by that time the law against burglary in practically all the states, certainly in all the states of this circuit, had developed so as to include not only common law burglary, but also the acts charged and adjudged against Costello as constituting burglary in this case. 23 A.L.R. 288. The sections of the Fire Arms Act in question were directed against persons who had been convicted of "crimes of violence" and the reason for including burglary in the definition was that burglary has always been and now is universally so regarded. It is unreasonable to infer that Congress intended the word burglary as used in Section 901 (6) to be given the restricted meaning that it had at common law. Counsel has argued that if the term burglary in the section be not governed by the common law definition, any state legislation calling a traffic offense by the name of burglary would bring it within the federal statute. But as stated by the Court of Appeals for the First Circuit in *Cases* v. *United States*, 131 F.2d 916, 924; "It does not seem to us that there can be a sufficiently wide variety in the definition in the different states and territories of the crimes listed to make this classification unconstitutional [as discriminatory]."

But if in some cases an instance should be presented where state legislation defines as burglary some offense that is not a crime of violence, a question may be presented that is not here involved.

The question raised for the appellants as to the meaning to be given "burglary" was considered by the District Court of Colorado in *United States* v. *Kelly*, 146 F.Supp. 747. The defendant there tried under the Fire Arms Act, had been previously convicted like Costello of so called

second degree burglary under the Missouri statute. We quote with approval the following observations the court made when considering the motion for judgment of acquittal:

> "It would be a strange holding indeed for this court to say that it was the intent of Congress that one having been convicted of burglary by breaking into a building other than a dwelling house at a time other than between sunset and sunrise is more fit to have in his possession a firearm than one whose nefarious activities have been limited to dwelling houses at night.
>
> * * * * * * *
>
> "Moreover, in the opinion of the court, on the face of the statute, Congress showed its intention that the designated crimes of violence were to take their meaning from the statutes of the states where the conviction was had. Following the description of certain crimes of violence, Section 901(6) of 15 U.S.C.A., concludes by setting forth,
>
> > 'or assault with intent to commit any offense punishable by imprisonment for more than one year.'
>
> "Can it be said that 'any offense' means 'any offense at common law?' The answer has to be in the negative for the term 'any offense' is limited by the minimum imprisonment meted out for the assault to commit such offense, and this must be governed by state law, for the punishment at common law for assaults with intent to commit felonies 'varied according to the discretion of the court.' Wharton, Criminal Law, 12th ed. § 840, p. 1126." 146 F. Supp. 747, 752-753.

Compare *Braswell* v. *United States*, 10th Cir., 224 F.2d 706, where the defendant, accused under the Fire Arms Act had been convicted of burglary in a Texas court. In

Texas as in Missouri, burglary includes daytime breaking and entering of buildings other than dwellings, but the record of the case indicates that the Court of Appeals for the Tenth Circuit was not even called on to consider the question argued here. It affirmed conviction.

No error is found here in the rulings to the effect that the "burglary" on account of which Costello was charged and convicted in 1935 was "burglary" within the Fire Arms Act.

2. Costello was arrested by St. Louis Police Officers and taken to the city jail where he was searched and questioned and discharged. The Cadillac car which he was driving when arrested was also searched. He denied having a key to the glove compartment in the car, but the police officers found one of the keys taken from him fitted the glove compartment lock. The officers opened the compartment with the key and took possession of the revolver contained in it, which was shown to be the revolver described in the indictment as having been received by him. The arrest, search, and seizure were found to have been illegal under Missouri law in a proceeding in the Missouri State Court and it is not contended for the government that they were legal under the federal law. But it was not shown that any federal officer took part in the search and the court's refusal to suppress the gun and receiving it in evidence were sanctioned by the decision of this Court in *Jones* v. *United States*, 8 Cir., 217 F.2d 381, 382-383. Cf., *United States* v. *Benanti*, 2nd Cir., 244 F.2d 389, 392. The court's refusal to suppress the guns was without error.

3. This case presented the situation where one of the two defendants had given a statement orally and in writing to agents of the F.B.I. before the indictment was found, concerning the transactions upon which the indictment was based, and the other defendant had not done so.

In pre-trial proceedings and commencing at the opening statement and on many occasions during and after the trial, and on this appeal, Costello, who had not made any statement, has earnestly and persistently contended that he was entitled to a severance and trial apart from Cannella.

But Rule 8(b), Federal Rules of Civil Procedure, 18 U.S.C.A., provides that two or more defendants may be charged in the same indictment if they are alleged to have participated in the same transaction or in the same series of acts or transactions constituting the offenses charged. Under Rule 13 the court may order two or more indictments to be tried together if the offenses and the defendants could have been joined in a single indictment.

In this case the two defendants were closely associated in their work and otherwise. The charge against them in counts one and two, supported by the evidence, was that one defendant was an aider and abettor of the other in transporting the guns and therefore both were charged as principals. The fourth count was for conspiracy and guilty participation by both was necessary to convict either. It was necessary to show the acts of both defendants at the relevant times in order to obtain a realistic picture of the transactions involved. It is true that in trying them together the statement made by the one who had made it after the acts was hearsay and not probative of guilt as to the other, but the record in this case shows that the law to that effect was stated to and impressed upon the jury by the court and by each and all attorneys participating in the trial literally scores of times.

The ultimate question whether or not Costello aided and abetted Cannella in transporting the guns or whether they conspired to transport them or to have Costello receive them was not of such complicated nature that the evidence against each could not be separately considered as to each.

It is firmly settled for this Court that "the mere fact that admissions have been made by one [defendant] which are not evidence against the other is not a conclusive ground for ordering the parties to be tried separately." *Kansas City Star Co.* v. *United States*, 8 Cir., 240 F.2d 643, 652; In *Opper* v. *United States*, 348 U.S. 84, 95, the Supreme Court said:

> "* * * The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial."

We find no error requiring reversal because of the joint trial of the defendants.

4 & 5. The evidence was that Cannella first gave statements to agents of the F.B.I. on April 10, 1956, and was first called before the grand jury to testify on April 18, 1956. The Assistant United States Attorney in the Eastern District of Missouri, Forrest Boecker, testified that on April 17, 1956, he had caused an indictment to be drawn up charging Costello alone with the offenses later charged against the two defendants in counts one and two of the indictment. He put questions to Cannella on his first appearance before the grand jury but did not question him as a prospective defendant or have in mind that Cannella was implicated in the proposed charges against Costello. Mr. Boecker said that it was the view of the government at that time that [Cannella] was not an object of suspicion or a defendant. He said "it is a fair statement to say

that after I heard Cannella's testimony he was joined as a defendant." No evidence was adduced as to what Cannella testified to on April 18, 1956. He was subpoenaed again and testified before the grand jury on April 23, 1956. "He was warned [as to his constitutional rights] on April 23rd, but he was not warned when he appeared on April 18th." All the testimony he gave on the 23rd was made available to appellants. The prosecutor read part of it to the jury on the trial. The defendants read substantially all the rest but the court refused to compel the government to produce for inspection a copy of his testimony at his first appearance.

The ground on which the production was resisted was that there was no showing of cause to invade the secrecy of the grand jury in respect to it. In cases of alleged perjury before a grand jury a transcript of an accused's testimony there given must be made available, but no such charge was here involved. A trial court unquestionably had the power under Rule 6(e) of the Federal Rules of Civil Procedure, 18 U.S.C.A., to order the grand jury proceedings transcribed and produced. Such power should be exercised only where there is a clear showing that the ends of justice require it. *Lawn* v. *United States,* 355 U.S. 339, 362; *Herzog* v. *United States,* 9th Cir., 226 F.2d 561, 566. No such showing was made here and we find no prejudice to either defendant resulting from the court's refusal to compel the production and no error.

On the other hand the government offered and the court received statements which Cannella voluntarily made to the grand jury on his second appearance after he had been warned of his rights, to the effect that he had knowledge of Costello's prior conviction of a crime. His knowledge was not derived from seeing the record, but in his employment under and association with Costello he had heard it talked about and "it had been published in the newspaper". It is argued that "Costello was damaged by this

evidence because it showed that [because of the way Cannella had become informed] Costello had an ill name with his neighbors" and therefore "it opened the issue of his bad character". But whether or not Cannella knew of Costello's prior conviction was an essential element of the charge of the indictment to be inquired into and established. It was not error to receive evidence competent to prove a charge against the defendant because it may also prove more against him than he is charged with. We do not sustain either of the points we have numbered (4) and (5).

6. As to the complaint that the prosecutor was permitted to cross examine and impeach witnesses whom he had called, it appeared that the government witnesses Goldstein and David Cannella each testified contrary to a statement he had given to the government. When that developed the court permitted the government to interrogate the witnesses respectively concerning their former statements. The witness Goldstein also claimed in effect that government officers had wrongfully taken him from his home to the grand jury without opportunity to either dress himself or communicate and subjected him to wrongful coercion. The court permitted the officers concerned to testify in rebuttal to their serving of the subpoena upon Goldstein in ordinary and proper course. We do not find that the court abused its discretion either in permitting the questioning of the hostile witnesses - - - See and Compare *Meeks* v. *United States,* 9th Cir., 179 F.2d 319; *Carrado* v. *United States,* D.C. Cir., 210 F.2d 712, cert. den. 347 U.S. 1018; *United States* v. *Graham,* 2nd Cir., 102 F.2d 436, cert. den. 307 U.S. 643; *Moomaw* v. *United States,* 5th Cir., 220 F.2d 589; *Doto* v. *United States,* D.C. Cir., 223 F.2d 309, cert. den. 350 U.S. 847 - - - or in introducing the impeaching testimony which tended to protect the dignity of the court officers. *State* v. *Sharp,* 138 S.C. 58, 135 S.E., 635; *People* v. *Gross,* 230 Mich. 653, 203 N.W. 534; *Martin*

v. *State*, 80 Texas Cr. 199, 189 S.W. 264; *Caldwell* v. *State*, 82 Ga. App. 480, 61 S.E.2d 543; *Commonwealth* v. *Cohan*, 307 Mass. 179, 29 N.E.2d 693; *Tice* v. *State*, Okla. 283 P.2d 873.

7. Complaint is made of three instances during the trial when the court either in voicing its own reaction or in sustaining objections by the prosecution spoke somewhat sternly to defendant's counsel. The defense of the cases was carried on with earnestness, zeal, and skill by able counsel and we have not failed to fully consider the contention that the court's remarks were unfair and unjust. We think the colloquies complained of were not sufficiently important to merit repetition and we conclude that the defendants were in no wise deprived of the effective assistance of their counsel by any improper action towards them or statements by the court to them. *Goldstein* v. *United States*, 8th Cir., 63 F.2d 609, 613. On the contrary, the trial was conducted with fairness and dignity.

8. As to instructions given and refused. After instructing that Costello could be found guilty on the first count only on finding that he had requested and directed Cannella to transport the gun in interstate commerce, Costello having theretofore been convicted of burglary, the court then instructed that Cannella could be convicted upon that count only if Costello was found guilty thereon. It is argued that the instruction containing "an assertion of interrelationship of guilt" was erroneous under the decision in *United States* v. *Klass*, 3rd Cir., 166 F.2d 373, 380. The contention is without merit. In this case commission of the crime charged in the count was dependent, as the court charged, upon its having been instigated by the ex-convict, Costello. If any element of guilt on Costello's part was lacking Cannella could not be convicted.

The court instructed upon the credibility of impeached witnesses that the jury "may accept such portions of testi-

mony of such witnesses who has been impeached or who has knowingly testified falsely as you believe to be true and credible" and also that if either of the defendants made statements to investigating officers regarding the matter under inquiry and pertinent to the inquiry contrary to proven fact and did so willingly and with knowledge of the falsity "you are at liberty to consider that circumstance as evidence of that defendant's guilty conscience."

The instructions as a whole which were given as to credibility of witnesses were reasonable and proper.

The court did not read to the jury the statute under which the indictment was laid, but the court stated all the elements necessary to a finding of guilty. That was fully sufficient in the case of a crime of such few and simple elements as was here involved. *Holland* v. *United States,* 10th Cir., 209 F.2d 516, aff'd. 348 U.S. 121; *United States* v. *Heine,* 2nd Cir., 149 F.2d 485, cert. den. 325 U.S. 885; *United States* v. *Capitol Meats,* 2nd Cir., 166 F.2d 537, cert. den. 334 U.S. 812; *Lewis* v. *United States,* 10th Cir., 49 F.2d 272.

The court gave the jury what has been referred to as the "Allen instruction" in which the jury was urged to try to agree upon a verdict and we find no error in giving the instruction. *Allen* v. *United States,* 164 U.S. 492; *United States* v. *Wright,* 8th Cir., 175 F.2d 384, cert. den. 388 U.S. 873; *Nick* v. *United States,* 8th Cir., 122 F.2d 660, cert. den. 314 U.S. 687; *Bowen* v. *United States,* 8th Cir., 153 F.2d 747, cert. den. 328 U.S. 747.

In addition to his contention that he had not been convicted of "burglary" within the Act, Costello also contended on his motion for instructed verdict that there was insufficiency of the evidence that he in any way participated in the purchase of the guns. We think the competent circumstantial evidence as outlined herein required submission of that question to the jury.

Opinion as to Cannella.

Cannella was interrogated by F.B.I. agents and made a voluntary statement to them as follows:

"I, JOSEPH JOHN CANNELLA, make the following voluntary signed statement to Special Agents Herbert K. Moss and Earl C. Porter, who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. I have been advised that I do not have to give a statement and that any statement I do make may be used against me in a court of law. No threat or promise of reward have been made to me in order to get me to give this signed statement. I have been advised of my right to consult with an attorney prior to furnishing a statement. I was born April 12, 1915, at St. Louis, Missouri. I have been employed as an Ace Cab owner and supervisor for Ace Cab Company since about November, 1953. I presently reside at 4713 Hatz, Northwoods, Missouri. About the first part of December, 1955, Joseph Costello said to me at the Ace lot 'Let's take a ride to Granite City, Illinois', and Costello and myself then drove in Costello's Cadillac automobile to Granite City, Illinois. Upon arrival in the vicinity of Granite City, Costello said, 'We have to look around for a gun shop'. However, Costello and I drove directly to Earl Lewis Gun Shop in Granite City, Illinois, in Costello's blue Cadillac convertible. This is the only stop we made. Upon arrival at the Earl Lewis Gun Shop in Granite City, Illinois, there was only one man present whom I know to be Earl Lewis, and he provided a catalogue of guns and Costello looked in the catalogue and picked out three guns from the catalogue and Costello told Lewis to order three guns for Costello and to call me when they arrived. I told him to call 'Joe, the supervisor', and to aid him in doing so I wrote the notation 'Joe, Main 1-8495'. Costello and I then returned to St. Louis, Missouri, and ap-

proximately a week later I received a radio call from the Ace Cab dispatcher requesting I call the Ace Cab office. I did call the Ace Cab office and a girl in the office told me to call a certain number. I did call this number and it was Earl Lewis. He advised me the guns that Costello had ordered had arrived. I then had the Ace Cab office tell Joe Costello that the guns had arrived at Lewis Gun Shop at which time Costello gave me $180. in cash, and I proceeded to the Earl Lewis Gun Shop, Granite City, Illinois, and upon arrival was advised by Lewis that the guns were not the exact type as ordered by Costello. From the Earl Lewis Gun Shop I then called Costello and he told me if the guns were not as he had ordered for me not to accept them. I did not accept these guns, and returned to St. Louis. Upon arrival at the Ace Cab lot I offered the $180 to Costello which $180 he had originally provided me to buy the three guns, at which time Costello directed me to put the $180 in an envelope and give to Joe Muth, and have Muth put the envelope containing the money in the office safe at the Ace Cab office, which I did. About one week thereafter I again received a radio call from the radio dispatcher of the Ace Cab Company advising me to call the Ace Cab office, which I did. Some girl in the office advised me to call a certain number, which I did, which was the Earl Lewis Gun Shop, Granite City, Illinois. Lewis told me the guns that Costello had originally ordered had arrived. I then told Joe Muth that I wanted the envelope out of the office safe, which he gave me, and on the same date I made the telephone call to Lewis I proceeded to the Earl Lewis Gun Shop, Lewis gave me the three guns which Costello had originally ordered, and I gave Lewis $180 as a purchase price for these three guns, and Lewis gave me some change, exact amount not recalled by me. However, it was only a few dollars, as I recall that the purchase price for each gun was approximately

$59. This was the sum of $180 that Joe Costello had originally given to me as a purchase price for these guns as referred to above. Before departing from Lewis Gun Shop I signed the name 'Joe Overbeck, 4186 Kingshighway', city and state not shown, as a purchaser for these guns. I then returned to the Ace Cab lot, St. Louis, Missouri, with the three guns in the cartons, took them in and placed them on a desk in Joe Costello's private office. In my presence Costello opened the cartons and looked at the guns. I have not seen these guns since delivering them to Costello in his private office. Sometime later, on the day or the day after Costello was arrested by the St. Louis Police Department in early 1956 * * *. Special Agent Porter has exhibited to me a longhand entry dated December 22, 1955, in the name 'Joe Overbeck, 4186 Kingshighway'. I wish to state that this is my handwriting. Also Mr. Porter has exhibited to me a note 'Joe, Main 1-8495', which I state is likewise in my handwriting. I provided this note with the name 'Joe' to Earl Lewis on my first visit to Lewis Gun Shop. The entry 'Joe Overbeck, 4186 Kingshighway' was made by me when I received the three above-mentioned guns from Lewis."

Other statements made to the agents by Cannella before he made the above were checked as to veracity by the agents in his presence by telephone and discredited. Thereupon he gave the above account, which he said was the truth and at the conclusion of it he said he was fearful that it would come to Costello's attention that he had provided the information and "he did not think his life would be worth a nickel." He began rubbing his hands over his forehead and said "My God, My God, what is going to happen to me" and he became ill.

(1) It is strenuously argued for both defendants that the court erred in receiving the testimony of the agents

concerning Cannella's conduct and exclamations at the time he gave them his statement. The circumstances bore not only upon the admissibility of Cannella's statement against his interest but also upon its credibility. It was a voluntary statement freely made and there was no error in receiving it in evidence together with the testimony as to the circumstances surrounding the giving of it.

(2) The government offered in evidence and the court received the testimony which Cannella gave to the grand jury at his second appearance before it on April 23rd, concerning his knowledge of Costello's criminal record. Cannella had been duly warned of his rights and gave the testimony voluntarily. Both as a witness before the grand jury and as a witness in his own behalf at the trial he denied knowing the specific crime for which Costello had been convicted in 1935. The court instructed and it is conceded that Cannella could not be convicted unless "he knew that Costello had been convicted of burglary as charged in the indictment". The government "submits that such knowledge was imputed to [Cannella] by circumstantial evidence and by [his] partial admission". He admitted before the grand jury that he knew Costello was reputed to have a criminal record and that he had been in prison and when he obtained the guns (he said for Costello, with money supplied by Costello) he signed a fictitious name on the dealer's register and gave a false address. When he was first interrogated by the F.B.I. agents h gave a false account of the transaction and when he cha d his story and involved Costello he evinced a guilty conscience and fear of consequences.

We are not cited to precedents as to the degree of proof of knowledge of the principal's prior crime that is required to support conviction of an aider and abettor under the sections of the Act here involved. We think the situation is comparable to cases where the accusation is that of

receiving stolen goods knowing them to have been stolen. It has long been settled that such knowledge may be imputed beyond reasonable doubt by circumstantial evidence.

> "The requisite guilty knowledge need not be actual, direct, positive, or absolute, but may be constructive, implied, or circumstantial. It is not essential to a conviction that the requisite guilty knowledge that the goods were stolen should be actual, direct or positive and absolute, such, for instance, as knowledge acquired by having personally witnessed or observed the theft, or by information of the theft from persons who had personal knowledge, such as eye witnesses or the person from whom the goods were received; the requisite knowledge may be circumstantial or deductive, and constructive or implied knowledge through notice of facts and circumstances from which guilty knowledge may be fairly inferred satisfies the requirements as to knowledge. 76 Corpus Juris Sec. Section 8, p. 12."

In this case Cannella's admission that he knew that Costello had a criminal record and had been imprisoned for crime, coupled with his conduct in giving a false name and address to the gun dealer and his attempt to cover up Costello's connection with the purchase and transportation of the guns by false statements to the officers, constitute circumstantial evidence of his guilty knowledge sufficient to support the verdict of the jury on the issue.

Each of the assignments of error that have been discussed in relation to Costello have also been carefully considered in respect to Cannella, but we find the conviction of Cannella was without error.

Although some further points have been argued and have been fully considered, they lack merit and have not required discussion.

Both Costello and Cannella were accorded a fair trial and the convictions and sentences of thirty months as to Costello and eighteen months as to Cannella are affirmed.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

United States Court of Appeals for the Eighth Circuit.

No. 15801. September Term, 1957.
Tuesday, May 20, 1958.

Joseph John Cannella, Appellant,
vs.
United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Joseph John Cannella, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

May 20th, 1958.

Nos.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 221

JOSEPH COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 224

JOSEPH JOHN CANNELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Costello Pet. App. 17-36; Cannella Pet. App. 15-34) is reported at 255 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1958 (Costello Pet. App. 36; Cannella Pet.

App. 34). A joint petition for rehearing was denied on June 27, 1958. Costello's petition for a writ of certiorari was filed on July 25, 1958, and Cannella's petition was filed on July 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A. Both petitioners raise the following questions:

1. Whether statutory as well as common law burglary is within the purview of the Federal Firearms Act, which prohibits interstate transportation of firearms by any person who has been convicted of a "crime of violence," and which lists burglary as such a crime.

2. Whether it was error to deny a motion to suppress as evidence a revolver which a state court found had been illegally seized by state officers, where (a) there was no federal participation in the search and seizure and, (b), petitioners received concurrent sentences on another count not based on this evidence.

3. Whether, in view of the fact that both petitioners testified in their own behalf and had prior felony convictions, the court erred in instructing that a witness could be impeached by reason of a prior felony conviction, and that the jury might disregard testimony of an impeached witness unless corroborated by other evidence, but could not consider the fact of a former conviction with respect to the principal issues raised by the indictment.

B. Joseph Costello (No. 221) raises, in addition, the following question:

4. Whether the court abused its discretion in denying a motion for a severance.

C. Joseph Cannella (No. 224) raises the following additional questions:

5. Whether his grand jury testimony tending to show knowledge of his codefendant's previous conviction of a crime of violence was admissible, where prior to such testimony the government attorney had warned him of his constitutional right against self-incrimination.

6. Whether the court abused its discretion, in refusing to order his testimony on the occasion of a previous appearance before the grand jury produced for inspection.

7. Whether the evidence was sufficient to prove his knowledge that his codefendant had previously been convicted of a crime of violence.

STATUTES INVOLVED

The Federal Firearms Act of June 30, 1938, 52 Stat. 1250, 1251, provided:

> Section 1 [15 U.S.C. 901]:
>
> * * * * *
>
> (6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.
>
> * * * * *
>
> Section 2 [15 U.S.C. 902]:
>
> * * * * *
>
> (e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence or who is a fugutive [*sic*] from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugutive [*sic*] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

18 U.S.C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

In a four-count indictment returned in the United States District Court for the Eastern District of Missouri, count 1 charged petitioners Costello and Cannella with illegally transporting a revolver, serial number 68897, in interstate commerce on December 22, 1955 in violation of 15 U.S.C. 902(e) and 18 U.S.C. 2 (*supra*, pp. 3, 4); Costello having previously been convicted of burglary in a Missouri court (R. 1). Count 3 charged the illegal receipt of this revolver by Costello in violation of 15 U.S.C. 902(f) (*supra*, p. 4) (R. 2). Count 2 was identical with count 1, except that it involved a different revolver, serial number 65965 (R. 1-2). Count 4 was a conspiracy charge in which the overt act

alleged was Cannella's obtaining these two revolvers on December 22, 1955 (R. 2-3). Petitioners were found guilty on all counts (R. 328). Costello was sentenced to concurrent terms of imprisonment for 30 months on each of the four counts (R. 335-336). Cannella was sentenced to concurrent terms of imprisonment for 18 months on counts 1, 2, and 4 (R. 337-338). On appeal (R. 338-341), both convictions were unanimously affirmed (Costello Pet. App. 36; Cannella Pet. App. 34).

Pertinent evidence may be summarized as follows:

1. Costello, president of the Ace Cab Company, lived in St. Louis, Missouri. Cannella was a cab driver and supervisor for this company (R. 223-224, 210).

A judgment in the Circuit Court of St. Francois County, Missouri, dated February 29, 1936, disclosed that Costello had been found guilty of "Burglary and Larceny as charged in the information" and sentenced to two years' imprisonment in the Missouri penitentiary (R. 59-60). Costello admitted this conviction (R. 228).

2. In the early part of 1955, Costello asked one Arnold, a gun collector, where he could get a .38 caliber Smith & Wesson Terrier, and Arnold referred him to a gun dealer named Lewis in Granite City, Illinois (R. 67-68). When Costello and Cannella went to Lewis' shop, they spoke to him on the subject of "guns." On another occasion, Cannella came to the shop and ordered three guns (R. 105, 110). Cannella left with Lewis a notation of the Ace Cab Company telephone number, at which number Lewis was to telephone him, asking for "Joe", when the ordered guns were received. Lewis telephoned the Ace Cab Company, asked for the "Joe" who knew Lewis in Granite City, and reported, "Well,

I got what you ordered" (R. 109, 112). On December 22, 1955, at Lewis' shop, Cannella picked up three guns with serial numbers 65965, 69436, and 68897 and paid $178.80 (R. 106, 109, 111, 112). Cannella signed a fictitious name ("Joe Overbeck") and address on the dealer's register when he received the guns (R. 110, 112). The three guns were introduced in evidence at the trial over petitioners' objection (R. 111, 112).

3. Gov. Ex. 4 (the gun involved in count 2) was found in the possession of one Klaich, who had once seen a gun in Costello's desk drawer, and said he would like to have such a gun for protection of his tavern. Cannella contacted Klaich, received $70 from him, and later delivered the gun to him (R. 114-115).

Gov. Ex. 6 (the gun involved in counts 1, 3) was found fully loaded in the locked glove compartment of the Cadillac driven by Costello when he was arrested by the St. Louis police on February 27, 1956. Costello denied having a key for the glove compartment, but it was opened with a key in Costello's possession at the time of his arrest (R. 125, 127-129, 130-131, 136, 138.) The Circuit Court of the City of St. Louis, in a case arising out of this same arrest, in which Costello was charged with carrying a concealed weapon, ruled that the search of his automobile was illegal and ordered that evidence obtained by this search and seizure should be suppressed (R. 32-39). In the instant case, defense motions, both before and during the trial, to suppress evidence obtained in the search of Costello's car, were overruled (R. 4-9, 28-42, 111-112, 138-139, 344). There was no showing that any federal officer took part in the search (R. 39, 41).

4. Cannella was interviewed at the St. Louis offices of the F.B.I. on April 10, 1956 (R. 149). At first, he

gave an oral statement to the effect that he had purchased three guns from Lewis in December 1955; had placed the guns in the Ace Cab Company safe; had borrowed Costello's Cadillac to attend the wedding of his (Cannella's) niece; had transferred the guns to the glove compartment of the Cadillac with the intention of taking them to his home; had forgotten about the guns; and that on the next day Costello said that the guns which Cannella left in the glove compartment had gotten him (Costello) in trouble (R. 160-162). After an F.B.I. agent checked the marriage records and told Cannella that the date of his niece's marriage was October 15, 1955 (not in December), he admitted that he had related an "incorrect story" (R. 162-164).

Cannella then gave the F.B.I. a written statement which was introduced in evidence as to Cannella only (R. 155-158, 164). The substance of this statement was that Cannella, at Costello's direction and with money furnished by Costello, had bought the guns from Earl Lewis' shop in Granite City, Illinois; transported them in interstate commerce from Illinois to Costello's Ace Cab Company office in St. Louis, Missouri; and delivered them to Costello. The F.B.I. agent who took Cannella's written statement testified, over objection by both petitioners, that after furnishing the statement, Cannella expressed fear that it would come to Costello's attention that he had provided this information. This testimony was also limited to Cannella only (R. 165, 166).

5. In order to show Cannella's knowledge that Costello had previously been convicted of a "crime of violence" under 15 U.S.C. 901(6) (*supra*, p. 3), the government introduced in evidence, over objection, testimony by Cannella on April 23, 1956 before the grand

jury which returned the indictment (R. 76-81). This grand jury testimony was to the effect that shortly after Cannella began working for the Ace Cab Company in 1949 he heard as a matter of general reputation that Costello had been convicted of some crime and had served time in prison. He testified that he did not know the exact nature of the crime (R. 79, 80, 81). When told that it was in the newspaper that Costello had a record of burglary conviction, Cannella, although admitting that he did read the papers, answered "I didn't pay too much attention; I haven't got that much education" (R. 83, 87).

Both petitioners testified in their own defense. Costello denied all of the charges in the indictment (R. 226-227). Cannella denied that he bought the guns at Costello's request or with Costello's money. He testified that his signed statement to the F.B.I. was not true since he was sick when it was given (R. 214). He testified that he knew "Costello had been in jail but [he] did not know for what" (R. 214).

ARGUMENT

1. Both petitioners contend that the term "burglary" as used in Section 1(6) of the Federal Firearms Act, 15 U.S.C. 901(6) (*supra*, p. 3) is limited to common law burglary which is the breaking and entering in the night-time of another's dwelling house with intent to commit a felony therein. They attempted to prove at the trial that Costello's Missouri conviction was for second degree burglary, based on the breaking and entering of a jewelry store with intent to steal (see R. 267-270), a crime which lacked the dwelling-house and night-time elements of common law burglary (Costello Pet. 8-10; Cannella Pet. 10-11).

The highly restrictive interpretation of the statute for which petitioners contend is unreasonable. While criminal statutes are to be strictly construed, this does not mean that they must be given the "narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett,* 348 U.S. 503, 509-510. The purpose of Congress in the enactment of the Federal Firearms Act was to "protect the public by preventing the transportation and possession of firearms and ammunition by those who, by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities." *Cases* v. *United States,* 131 F. 2d 916, 921 (C.A. 1), certiorari denied, 319 U.S. 770; *Braswell* v. *United States,* 224 F. 2d 706, 710 (C.A. 10), certiorari denied, 350 U.S. 845. The burglary for which Costello had been convicted was clearly a crime of violence, even though the entry was not into a dwelling-house. *United States* v. *Kelly,* 146 F. Supp. 747, 752-753 (D. Colo.), reversed on other grounds, 246 F. 2d 864 (C.A. 10).

As the court below pointed out, at the time of passage of the Act in 1938, the law of burglary had developed in practically all states to include not only common law but statutory burglary (Costello Pet. App. 22). The listing of burglary in the statute as a crime of violence is therefore reasonably interpreted as applying to the crime of burglary as it was then generally defined—which would include breaking into a store.

2. Physical possession of the gun, the transportation and receipt of which formed the basis of the counts 1 and 3, was obtained by state officers, without federal participation, in a search which the state court found to be illegal, suppressing the gun as evidence in the state courts. The federal court, in overuling the mo-

tion to suppress, presumably relied on the fact that no federal officer participated in the undertaking, since it made no independent finding that the search was justified (R. 41, 138-139). The Court of Appeals also based its affirmation on this ground. Petitioners ask this Court to reconsider the ruling that evidence resulting from a search not participated in by federal officers is not subject to suppression in federal courts.

Resolution of this issue is not, however, necessary for a disposition of this case. The gun which formed the basis of count 2 was not the subject of a motion to suppress. And since petitioners received concurrent sentences on all counts, count 2 alone will support the verdict. *United States* v. *Sheridan*, 329 U.S. 379, 381; *Pinkerton* v. *United States*, 328 U.S. 640, 641; *Hirabayashi* v. *United States*, 320 U.S. 81, 84. Even as to counts 1 and 3, the physical introduction of the gun in evidence was not the major part of the evidence of the crimes charged—the transportation and receipt of the gun. The testimony of Lewis was the evidence which showed the purchase of the guns and their interstate transportation at the instance of Costello, with the assistance of Cannella. The gun itself was not a major factor. Accordingly, we think that there is no occasion to reach the issue presented by the motion to suppress which relates to counts 1 and 3.

If, however, the Court should deem the issue appropriate for resolution, we submit that the ruling of the court below is correct. Evidence obtained by state officers without federal participation has been recognized as admissible in federal prosecutions ever since the federal rule of exclusion was first formulated. *Weeks* v. *United States*, 232 U. S. 383, 398; *Byars* v. *United States*, 273 U.S. 28, 33; *Lustig* v. *United States*,

338 U.S. 74, 78-79; *Gaitan* v. *United States*, 252 F. 2d 256, 258-259 (C.A. 10), certiorari denied, 356 U.S. 937 (see the Government's brief in opposition in that case, No. 843, O.T. 1957). The facts that here the state has a rule of exclusion, and that the evidence was actually excluded by a state court, do not change this principle. As the Ninth Circuit ruled with respect to a similar contention in *Rios* v. *United States*, decided May 26, 1958, petition for certiorari pending, No. 40 Misc., this Term,[1] there is "no reason why the same rule should not be applied where the determination that the evidence was illegally seized by state or local authorities is made by a state trial court. The 'silver platter' doctrine operates on the assumption that the illegality of the state seizure has been established. How it has been established is immaterial."

The federal courts are not and should not be concerned with disciplining state officers. So long as federal officers are not involved, the federal courts may properly receive evidence which proves a violation of federal law. It is not part of the federal court's jurisdiction or province to correct state officers.

3. Both petitioners took the stand and both had been convicted of a felony (R. 59-60, 281-283). They complain of the court's charge (R. 317) that a witness might be impeached by showing a felony conviction and leaving the jury at liberty to disregard the entire testimony of an impeached witness unless corroborated by other evidence (Costello Pet. 15-16; Cannella Pet. 12-13).

---

[1] As pointed out in the Government's brief in opposition in *Rios*, this issue is only tangentially involved in that case since there the court made an independent finding that the search was reasonable.

The charge was, however, the usual one relating to credibility of witnesses, and was correct. Cf. *United States* v. *Guertler*, 147 F. 2d 796, 797 (C.A. 2), certiorari denied, 325 U.S. 879; *Kean* v. *National City Bank*, 12 F. 2d 203, 204 (C.A. 6); *Magidson* v. *Duggan*, 212 F. 2d 748, 759 (C.A. 8). It left the jury "at liberty to disregard" testimony of an impeached witness, but it did not compel such disregard. To the contrary, it permitted acceptance of "such portion of the testimony of such witness who has been impeached * * * as you believe to be true and credible."

The jury was further instructed (R. 319-320):

> Evidence has been introduced that Joseph John Cannella has a prior conviction for violation of the liquor laws of the State of Missouri.
>
> In this respect, I charge you as a matter of law that this conviction is not a crime of violence within the meaning of the Federal Firearms Act and should not be considered by you in determining the guilt or innocence of defendants, but may only be considered for the purpose of determining the credibility of Cannella as a witness.
>
> Evidence has been introduced that defendant Costello has had a prior conviction of the offense of burglary. Evidence of this prior conviction may only be considered by you as bearing on the element of the prior conviction required for the crime charged. It should not be considered by you for any other purpose in determining his guilt of the offense charged.
>
> * * * * *
>
> Evidence has been introduced that defendant Costello has been formerly convicted of the crime

> of burglary. The issues as to whether or not he received, transported or shipped firearms in interstate commerce or conspired so to do should be considered by you solely and only upon the other evidence which is introduced before you at trial pertaining to those issues. The fact of a former conviction should be considered by the jury only as bearing upon the issue as to whether or not he has been convicted of a crime of violence within the meaning of the statute and for no other purpose. The fact of a former conviction should not be considered by you on the issues as to whether he received, transported or shipped firearms in interstate commerce or conspired so to do.

Thus, the instructions to the jury fully and accurately indicated the proper relevance of the prior convictions to the issues in the case and afforded petitioners the protection to which they were entitled. Their position was no different from that of any other defendant who, having a previous felony conviction, elects to testify.

4. Petitioner Costello argues that the court abused its discretion in denying his requests for a severance. It is said that the remarks made by Cammella after he executed his signed statement—that he was fearful that it would come to Costello's attention that he had provided information to the FBI (R. 165-166)—were so prejudicial that they warranted a severance and mistrial, despite cautionary instructions that these were not to be considered against Costello (Costello Pet. 12-15). The contention is without merit.

Throughout the trial and in its final charge, the court made clear to the jurors that, when evidence related to only one codefendant but was hearsay as to the other,

they should consider it only against the one to whom the evidence related (R. 63, 127, 130, 151, 155, 166, 274-275, 277, 284, 290, 318-319). Petitioners had different counsel and their separable interests were stressed. At the time Cannella's challenged remarks were introduced, the court stated that they could not be considered as evidence against Costello (R. 166), and in its final charge again made this explicitly clear (R. 319-320). In these circumstances, "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States*, 348 U.S. 84, 95.

The issues involved were not so complex that the jury could not intelligently follow a joint trial. The two petitioners were closely associated in perpetrating the crimes charged and were properly joined as codefendants under Rule 8(b), F. R. Crim. P., as having "participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." There was no abuse of the court's discretion in refusing a severance. Cf. *Delli Paoli* v. *United States*, 352 U.S. 232, 243; *Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 651-653 (C.A. 8), certiorari denied, 354 U.S. 923.

Neither did the court err in instructing the jurors (R. 311-312) that if, and only if, they found Costello guilty under counts 1 and 2, they should then consider whether Cannella aided and abetted Costello in commission of the offenses (Costello Pet. 14-15). In the particular circumstances, such an instruction hypothesizing interrelationship of guilt between the two

petitioners was unavoidable. Without Costello's prior conviction for burglary and without his complicity in the interstate movement of the revolvers, there were no federal crimes. In *United States* v. *Klass*, 166 F. 2d 373 (C.A. 3) (Costello Pet. 15), it was possible to find the guilt of several codefendants (the seller of a house as principal and the sales agents as aiders and abettors) independently, and therefore it was held to be error to link the defendants in the charge. That is not the situation here.

5. Petitioner Cannella was subpoenaed and testified before the grand jury on April 18 and April 23, 1956 (R. 18, 24, 26). The government attorney testified that at the April 18 appearance he did not question Cannella as a prospective defendant or consider that he was implicated in the charges contained in an indictment he had drafted naming Costello alone (R. 24-26, 22-23). The government attorney further testified, "It is a fair statement to say that after I heard Mr. Cannella's testimony he was joined as a defendant" (R. 26). Cannella was not warned on April 18, but on April 23, at the beginning of the testimony, this colloquy occurred (R. 78, 26):

> Q. [By government attorney]. Mr. Cannella, I believe I should tell you that you are not required to make any statement here that might tend to incriminate you. Do you understand that?
>
> A. Yes, sir.

During his April 23 appearance, Cannella gave testimony, later introduced over an objection at the trial, tending to show his knowledge that Costello had been convicted of a "crime of violence" (R. 76-81).

Cannella's contention is that his grand jury testimony showing knowledge of Costello's previous conviction was inadmissible, since he, as a "de facto" defendant, gave his testimony without being afforded sufficient warning of his constitutional right against self-incrimination (Cannella Pet. 8-10).

In *United States* v. *Scully*, 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897, it was held that the mere possibility that a witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment when subpoenaed to testify before a grand jury. See also *United States* v. *Klein*, 247 F. 2d 908, 920-921 (C.A. 2), certiorari denied, 355 U.S. 924. In *Scully*, the witness later indicted was given no warning as to his constitutional right against self-incrimination. Cannella, however, was warned specifically as to this right, and answered that he understood it before continuing with his testimony. There was no need for the government attorney to expand his warning by stating further that Cannella was considered a defendant and was himself under investigation, since the warning as worded carried this reasonable implication. Cannella was of course not entitled to counsel at the grand jury hearing, but if he had feared self-incrimination he could have requested an adjournment in order to consult counsel before deciding whether to continue his testimony. No pressure or coercion was employed against him to complete his testimony subsequent to the warning as to his rights, and he continued voluntarily. The result is that it cannot be said that his grand jury testimony was obtained in an improper manner.

6. The court made available to Cannella the transcript of his grand jury testimony on April 23, but denied production for inspection of his April 18 testi-

mony (R. 61-62, 76-77). Cannella asserts that the court abused its discretion in refusing production of the April 18 testimony, which he says might have explained the April 23 testimony (Cannella Pet. 11-12).

It is submitted, however, that Cannella failed to lay a proper foundation showing possible relevancy and materiality of the April 18 testimony to warrant invading the secrecy of the grand jury proceedings, and that the court did not abuse its discretion in refusing production of this testimony.[2] Cf. *Herzog* v. *United States*, 226 F. 2d 561, 566-567 (C.A. 9); *United States* v. *Alper*, 156 F. 2d 222, 226 (C.A. 2); *United States* v. *Nunan*, 236 F. 2d 576, 594 (C.A. 2), certiorari denied, 353 U.S. 912. In cases of perjury before a grand jury, relevancy of the grand jury testimony is obvious, but in a situation like the instant case the laying of a foundation showing possible relevancy is essential.

It is the merest conjecture to surmise now that Cannella's April 18 testimony might have shown that he was of the impression that Costello had been confined in prison for an offense which was not a crime of violence (Cannella Pet. 12). If this were true, Cannella would have testified to this effect when he took the stand in presentation of his own defense. He did not so testify.

7. Finally, petitioner Cannella contends that the evidence was insufficient to prove his knowledge that

---

[2] This colloquy occurred when the government attorney was opposing production of the April 18 testimony (R. 77):

> Mr. Boecker: The ultimate fact is much of this is not relevant. We want to avoid just these side issues here. I should not be made to furnish the whole day's proceedings.
>
> "The Court: Objection overruled. Proceed."

See also R. 87-89.

Costello had previously been convicted of a crime of violence (Cannella Pet. 13-14).

This contention, fully considered and rejected by the court below and related solely to the particular facts of this ca presents no question which this Court need review. As the Court of Appeals properly observed (Cannella Pet. 33), "In this case Cannella's admission that he knew that Costello had a criminal record and had been imprisoned for crime, coupled with his conduct in giving a false name and address to the gun dealer and his attempt to cover up Costello's connection with the purchase and transportation of the guns by false statements to the officers, constitute circumstantial evidence of his guilty knowledge sufficient to support the verdict of the jury on the issue." No question is raised as to the instructions to the jury on this point. Proof of the requisite knowledge must generally rest upon circumstantial evidence and it was not error, in view of the evidence adduced, to permit the jury to resolve the issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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Nos.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

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UNITED STATES OF AMERICA.

JOSEPH JOHN CANNELLA,
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v.

UNITED STATES OF AMERICA.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

ARGUMENT.

1. The government contends that resolution of the issue raised by the motion to suppress is not necessary for the disposition of the case because the gun "which formed the basis of count 2 was not the subject of a motion to suppress." Brief for the United States in opposition, p. 10. But

the motion to suppress sought to suppress all of the evidence seized from Costello's automobile on February 27, 1956, the date of his arrest; and "any evidence gained directly or indirectly as a result of such search and seizure" (R. 29). Moreover, counsel for the government agreed that the entire indictment in this case was the result of this arrest (R. 32).

Even if we assume that the gun involved under count 2 was not subject to suppression, the government's position is without merit. The government argues that petitioners received concurrent sentences and "count 2 alone will support the verdict." The issue is not whether the evidence was sufficient on one count but whether the error in admitting the gun found in Costello's automobile and testimony concerning Costello's possession of the gun into evidence influenced the jury in reaching its verdict. **Kotteakos v. United States,** 328 U. S. 750. The government further contends that even as to Counts 1 and 3 "the physical introduction of the gun in evidence was not the major part of the evidence of the crimes charged." Brief for the United States in opposition, p. 10. But this position ignores the rule that where illegally obtained evidence is involved an Appellate Court will not weigh its capacity to influence the jury. **Honig v. United States,** 8 Cir., 208 F. (2d) 916, 921. And in cases involving illegal confessions this Court also does not weigh the capacity of the confession to influence the jury. It should also be noted that, if the motion to suppress had been sustained, not only the physical evidence of the gun would have been excluded but all testimony concerning the gun. Furthermore, the gun found in Costello's automobile was a major factor in the verdict. The government is in error in saying that the testimony of Lewis showed the interstate transportation of the guns. His testimony was limited to the purchase of the guns and was vague as to the participation of Costello in the purchase. Lewis stated that Cannella ordered the guns

and left a number where he was to telephone, asking for Joe, and that he did telephone and ask for Joe (R. 109, 112). There was no testimony apart from the tainted evidence linking Costello to the transportation.

Moreover, Count 1 and Count 2 of the indictment charged the same offense. The charge in these counts is analogous to that of **Bell v. United States**, 349 U. S. 81, where a statute which forbade the transportation in interstate commerce of any woman for the purpose of prostitution was construed to mean that the transportation of two women on the same trip and in the same vehicle constituted a single offense. The instant statute makes it unlawful to transport any firearms and the evidence showed that the two guns were obtained and transported at the same time.

The government relies in part on **Rios v. United States**, 9 Cir., 256 F. (2d) 173, petition for certiorari pending, No. 40 Misc. There the District Court made an independent finding that the search was reasonable. In the instant case, however, neither the Court nor the government considered the search to be reasonable. This Court has never decided the question as to whether or not the "silver platter" doctrine is applicable when a State has a State exclusionary rule, or whether it is applicable after a State Court has found that the State officers have seized the evidence illegally. The issue involved is not whether the Federal Court should or should not discipline or correct State officers. The issue is whether or not the "silver platter" doctrine should be extended to frustrate the deterrent effect of the State exclusionary rule.

2. The issue raised by the motion for a severance is not whether the jury might have been confused, but whether a jury which had to determine which of two F. B. I. statements attributed to Cannella was credible could disregard Cannella's alleged fright in determining Costello's guilt

after determining the credibility of the statements themselves by considering his alleged fear of retaliation from Costello.

The government's argument that there was no error in instructing the jury that if and only if they found Costello guilty they should consider whether Cannella aided and abetted him is fallacious. It ignores the fact that the Court ostensibly admitted in evidence Cannella's confession against Cannella himself. If Cannella were tried alone, Cannella's confession might have tipped the scales and convinced a jury to convict him. If Costello were tried alone, with Cannella's confession absent, the jury might have decided to acquit him. It was possible in the instant case to find the guilt of the two defendants independently because more evidence was admissible against Cannella than against Costello. The government's position in this respect defeats its argument that there was no error in not granting a severance. If the guilt of Costello and Cannella were interrelated and Cannella's confession was only admissible against him that fact alone should have entitled Costello to a severance because it was impossible for the jury to consider the evidence solely as to Cannella. Cf. **Anderson v. United States**, 318 U. S. 350, 356-357.

3. The important difference between **United States v. Scully**, 2 Cir., 225 F. (2d) 113, 116, certiorari denied, 350 U. S. 897, and the instant case relative to the calling of Cannella before the Grand Jury is the fact that in Scully there was only a mere possibility that the witness might later be indicted. Here Cannella was considered as a prospective defendant prior to his second appearance. It is obvious that the only reason that he was called before the Grand Jury was to obtain admissions to be used against him at the trial. Such a practice should not be approved. A person may be fully cognizant of his rights

not to testify against himself and yet be willing to testify as a witness prior to becoming a de facto defendant. However, a de facto defendant would rarely submit himself to examination by a government attorney outside the presence of his own counsel. It seems to us that there is a certain amount of deceit practiced when a defendant is called before the Grand Jury and not advised of his status as a defendant.

CONCLUSION.

For the reasons set out above and those set out in the petitions the writ of certiorari should be granted.

Respectfully submitted,

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Nos.

221

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SUPREME COURT, U. S.

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IN THE

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OCTOBER TERM, 1958.

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UNITED STATES OF AMERICA.

JOSEPH JOHN CANNELLA,
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v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari.

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IN THE

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PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari.

Petitioners pray that this Court grant rehearing of its order of October 13, 1958, denying the petitions for writ of certiorari, and that a writ of certiorari issue to review the judgments of the Court of Appeals for the Eighth Circuit in the above-entitled causes as prayed for in the petitions filed July 25, 1958, and July 26, 1958.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT.

These causes present the issue whether evidence obtained solely by state officers in an illegal search may be admissible in federal court, despite the Fourth Amendment.

This question was presented to the Eighth Circuit and it held, relying on its decision in **Jones v. United States**, 8 Cir., 217 F. 2d 318, that evidence which was seized by state officers was admissible because no federal officers participated in the search. At the time of the filing of the petition there was no conflict of decisions with another Court of Appeals. But on October 2, 1958, the United States Court of Appeals for the District of Columbia in the case of **Hanna v. United States**, 27 L. W. 2158 (Appendix, infra, p. 6), held that evidence obtained solely by state police officers during an illegal search cannot be used in a federal criminal proceeding.

The facts on this issue in the instant case summarized in the instant case by the Eighth Circuit as follows (Costello Pet. App. 24):

> "Costello was arrested by St. Louis police officers and taken to the city jail where he was searched and questioned and discharged. The Cadillac car which he was driving when arrested was also searched. He denied having a key to the glove compartment of the car, but the police officers found one in the keys taken from him fitted the glove compartment lock. The officers opened the compartment with the key and took possession of a revolver contained in it, which was shown to be the revolver described in the indictment as having been received by him. The arrest, search and seizure were found to have been illegal under Missouri law in a proceeding in the Missouri State Court and it is not contended for the Government that they were legal under the federal law. But it was not shown that any federal officer took part in the search and the court's refusal to suppress the gun and receiving it in evidence were sanctioned by the decision of this Court in **Jones v. United States**, 8 Cir., 217 F. 2d 381, 382-383. Cf. **United States v. Benanti**, 2nd Cir., 244 F. 2d

389, 392. The Court's refusal to suppress the guns was without error."

In the **Hanna** case, the defendant was convicted of housebreaking and larceny in the District of Columbia and appealed the refusal of the District Court to suppress as evidence a quantity of money seized by Maryland police officers without a warrant from a motel room occupied by the defendant. This money was not the major part of the evidence admitted against Hanna. The Court of Appeals found that the search was not a proper incident of a lawful arrest under Maryland law for the reason there was no probable cause for believing that the person arrested had committed a felony. The Court then considered the question: "May articles obtained by an unreasonable search and seizure by state officers, without any involvement of federal officers, be introduced in evidence in a court of the District of Columbia, or in any federal court?" The Appellate Court for the District of Columbia found that the decision in **Wolf v. Colorado**, 338 U. S. 25, overruled the very constitutional pronouncement which is the basis of **Weeks v. United States**, 232 U. S. 382, which said that a search and seizure by State officers was not a violation of any rights secured by the Constitution. The Appellate Court said:

> "* * * So, the precise decision in the **Wolf** case was that a state need not exclude evidence obtained by unconstitutional means from its judicial proceedings. But, in ruling that the Fourth Amendment prohibition operates through the Fourteenth to make unreasonable state searches unconstitutional, the Court in **Wolf** overruled the very constitutional pronouncement and holding upon which the **Weeks** decision, and our **Shelton** decision following Weeks, had predicated the admissibility of state seized evidence in a federal trial."

The **Hanna** opinion finds additional reasons for its decision in statements of this Court in **Lustig v. United States**, 338 U. S. 74, and **Irving v. California**, 374 U. S. 128. That Court also found expressions of opinion by a majority of the Justices of this Court to be in accord with the rule that all evidence obtained by an unconstitutional search and seizure is unacceptable in federal courts. It further concluded that as a matter of judicial integrity such evidence should not be admitted in a federal trial, and the refusal of the federal Courts to permit the use of such improperly obtained evidence will have an effect of persuading state as well as federal officers to follow constitutional methods and procedures in obtaining evidence.

On the other hand the Eighth Circuit in **Jones v. United States**, 8 Cir., 217 F. 2d 318, which was the case relied upon to affirm the instant judgment on this question also considered the decisions of this Court in **Weeks, Wolf, Lustig** and **Irvine**. But the Eighth Circuit, in conflict with the **Hanna** decision, stated in the **Jones** case that it would adhere to the rule that the Federal Government could avail itself of evidence improperly seized by state officers operating entirely upon their own accounts unless and until this Court expressly repudiated or explicitly changed this rule.

This Court's concern with the uniform administration of criminal justice in the various circuits warrants a resolution of this conflict.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of

certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

.....

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.....

.....

Bernard J. Mellman,
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APPENDIX.

Conflicting Opinion.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 14,462

Samuel J. Hanna, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court
for the District of Columbia

Decided October 2, 1958

Mr. Frederick A. Ballard (appointed by this court), with whom Mr. Eugene B. Thomas, Jr., was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher and Thomas A. Flannery, Assistant United States Attorneys, were on the brief, for appellee.

Before Bazelon, Circuit Judge, Hastie, Circuit Judge, United States Court of Appeals for the Third Circuit,* and Danaher, Circuit Judge.

Hastie, Circuit Judge: Convicted of housebreaking and larceny in this District, the appellant Hanna grounds this

* Sitting by designation pursuant to the provision of Sec. 291 (a), Title 28, U. S. Code.

appeal on the refusal of the District Court to suppress certain evidence; to wit, a quantity of money seized by Maryland police officers in a predawn search of a motel room occupied by appellant. Part of the hoard, paper money, was found under the sheets of the bed occupied by Hanna. The rest of the money, in coins, was found in a bag under his bed.

The search was admittedly without warrant. We need not examine most areas of the large body of authoritative rulings limiting very strictly the circumstances in which a search of premises without a warrant may constitutionally be made. For the only justification the prosecution urges for the search in this case is that it was a proper incident of a lawful arrest.

These are the circumstances of the arrest and search. Shortly after 4 a. m. state police officers came to a Maryland motel in response to a call from the motel keeper. When they arrived they were told that about 4 a. m. a man had rented two communicating rooms or cabins, ostensibly for himself and his invalid wife; that the motel keeper had not seen the woman but had seen two men entering the cabin with an overnight bag and what looked like a money bag. The motel keeper also related that he had looked through a window into one room and had observed the men sitting on the bed counting money. Thus informed, the police approached the rooms in question and found them dark and quiet. They knocked at the outer door which was opened from within by the occupant whom they confronted with a shot gun. As they entered they recognized the occupant as Robert Judd, a person with past convictions of theft who was then at large in Maryland on bond and was being sought by his bondsman because of delinquency in payment of the bond premium. Immediately upon thus recognizing Judd, the police placed him under arrest and proceeded to search the room he

was occupying and the adjoining room in which appellant had retired. Actually, the officers pulled the cover from appellant, required him to get out of bed and thereafter found the money in and under the bed.

In this record, the interrogation of Sergeant Bond, the arresting officer and apparently the officer in charge of the police detail, reveals great uncertainty on his part as to the reason and basis for arresting Judd. Sergeant Bond was asked whether he intended to make an arrest when he knocked on the cabin door. He replied, "I did not know what I thought because I did not know what to expect." In any event, the door was opened by a man whom the sergeant recognized as one who had been convicted of theft and was even then at large on bail. At that point and without more, the officer says he decided to make the arrest, and did so. In these circumstances, it is not surprising that the sergeant was vague and vacillating as to the reason for this arrest. At one point he stated that he arrested Judd for investigation in the light of the report he had received from the motel keeper. At another point he varied this by saying: "I arrested him for having in his possession narcotics and money and held him for investigation." Of course, this could not have been true because the contraband was discovered after and not before the arrest. Again, the officer testified that he was influenced by recognizing Judd as a person on bail whose bondsman had complained of non-payment of the bond premium. In this connection the sergeant made the puzzling statement, "I placed him under arrest because the fellow had been placed under arrest in our jurisdiction."

Maryland recognizes and enforces the familiar rule that, where no crime has been committed in his presence, a peace officer may make an arrest without warrant only on a felony charge, and then only on probable cause in the sense of reasonable ground for believing that the person

arrested has committed the felony charged. **Edwards v. State**, 1950, 196 Md. 233, 76 A. 2d 132; **Freedman v. State**, 1950, 195 Md. 275, 73 A. 2d 476. Sergeant Bond's own testimony cannot reasonably be said to disclose probable cause for arresting Judd on a felony charge. An arguable case might have been made in support of the arrest had the police been advised of a recent theft and alerted to be on the lookout for the suspected perpetrator. At least they would then have had some affirmative indication that the motel keeper's report might be related to a recent crime. **Cf. Edward v. State**, supra. But not until many hours later did the Maryland police learn of the earlier burglary in the District of Columbia, the proceeds of which constituted the evidence here sought to be suppressed. When the arrest was made the police had nothing significant upon which to go except Judd's known criminal record and the report that he had taken a money bag into the motel on registering very late at night. These circumstances aroused suspicion, and properly so. They may well have justified questioning and surveillance, but they certainly fell short of providing probable cause for a felony arrest at that point. We think it rather clear from what the officers knew and from Sergeant Bond's testimony that a decision was made to arrest on suspicion first, and then to see what could be found which would establish probable cause for detention on a felony charge.

In these circumstances the arrest could not provide any justification for the search which followed.[1] The entire

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[1] While our conclusion that the arrest was illegal is decisive, it seems appropriate to note in addition that, even if we should assume that the detention of Judd was justified, there would remain a serious question whether the circumstances of this arrest justified the ensuing exploratory search which carried the officers through a door, into an adjoining bedroom and into and under the bed in which another person had retired. *Cf. United States v. Lefkowitz*, 1932, 285 U. S. 452; *Go-Bart Importing Co. v. United States*, 1931, 282 U. S. 344; *Johnson v. State*, 1949, 193 Md. 136, 66 A. 2d 504.

nighttime search without warrant, including the excursion into the bedroom which yielded the money in controversy, must therefore be viewed as unreasonable and illegal. It violated Maryland law and, as will appear later, an unreasonable search by state officers also violates the Fourth Amendment as incorporated into the Fourteenth.

This brings us to a serious and important issue of law. May articles obtained by an unreasonable search and seizure by state officers, without any involvement of federal officers, be introduced in evidence in a court of the District of Columbia, or in any federal court?

We find it useful to trace the history of this question in the Supreme Court and, to some extent, in the Courts of Appeals. More than forty years ago, in **Weeks v. United States**, 1914, 232 U. S. 383, the Supreme Court reviewed a federal conviction said to have been based upon evidence obtained in two unauthorized and unreasonable searches and seizures, one by federal officers and the other by state officers. The Court held that the refusal of the trial court on appropriate motion to return the articles seized in the search by federal officers was a denial of a right secured by the Fourth Amendment and, therefore, that the subsequent admission of those articles in evidence was reversible error. However, the Court ruled that the equivalent search and seizure by state officers was not a violation of any right secured by the Constitution.[2] Accordingly, no error was found in the introduction of articles thus seized in evidence.

More than thirty years later, but with the **Weeks** doctrine still unquestioned law,[3] this court decided, properly

[2] A month earlier the Court had made an almost casual ruling to the same effect in different context. *National Safe Deposit Co. v. Stead*, 1914, 232 U. S. 58, 71.

[3] *Cf. Feldman v. United States*, 1944, 322 U. S. 487; *Byars v. United States*, 1927, 273 U. S. 28.

citing and relying upon **Weeks**, that articles seized by New York police officers in the course of an unreasonable search were admissible in evidence in a trial in the District of Columbia. **Shelton v. United States**, 1948, 83 U. S. App. D. C. 257, 169 F. 2d 665, cert. denied, 335 U. S. 834.

Then came **Wolf v. Colorado**, 1949, 338 U. S. 25. There the Supreme Court ruled explicitly, for the first time and contrary to the **Weeks** ruling on the point, that an unreasonable search and seizure by a state officer violates the Constitution because the Fourth Amendment prohibition of unreasonable searches and seizures is to be read into the Fourteenth Amendment as a requirement of due process of law. In the Court's words: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clauses." 338 U. S. at 27-28. The Court next reasoned that in enforcing this constitutional prohibition the states are not required to forbid the use of wrongfully seized items in evidence, though the use of evidence obtained by violation of the Fourth Amendment is forbidden in the federal courts under the **Weeks** rule. The states may content themselves with other sanctions against unreasonable searches and seizures. So, the precise decision in the **Wolf** case was that a state need not exclude evidence obtained by unconstitutional means from its judicial proceedings. But, in ruling that the Fourth Amendment prohibition operates through the Fourteenth to make unreasonable state searches unconstitutional, the Court in **Wolf** overruled the very constitutional pronouncement and holding upon which the **Weeks** decision, and our **Shelton** decision following **Weeks**, had predicated the admissibility of state seized evidence in a federal trial.

Oddly, even since the **Wolf** decision several Courts of Appeals have followed **Weeks** as to the admissibility of

evidence obtained by state officers in federal trials on the no longer tenable theory that the Constitution does not prohibit unreasonable searches and seizures by state officers. **E. g., Serio v. United States**, 5th Cir. 1953, 203 F. 2d 57 , 578, cert. denied, 346 U. S. 887; **United States v. Moses**, 7th Cir. 1956, 234 F. 2d 124, 125; **Gallegos v. United States**, 10th Cir. 1956, 237 F. 2d 694, 696. Overlooking the fact that since the **Wolf** case an unreasonable state seizure must be recognized as a violation of the Constitution, these courts have failed to come to grips with the problem whether there should be in the federal courts a comprehensive rule that evidence obtained by invasion of a constitutional right, whether by a state or federal officer, is inadmissible. **Cf. Jones v. United States**, 8th Cir. 1954, 217 F. 2d 381.

On the other hand, since the **Wolf** case Justices of the Supreme Court have repeatedly recognized that it is no longer possible to accept the **Weeks** [illegible] as settling this problem of federal use of evidence secured by unreasonable state search. Most recently, Mr. Chief Justice Warren has noted, ignoring the old **Weeks** ruling on the question, that "it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment." **Benanti v. United States**, 1957, 355 U. S. 96, 102 n. 10. Mr. Justice Frankfurter too has recognized the question as open, saying that "where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers." **Lustig v. United States**, 1949, 338 U. S. 74, 79.

Even more striking are expressions of opinion by three other Justices. Mr. Justice Douglas, dissenting from the ultimate holding in **Wolf v. Colorado**, supra, tersely stated his conclusion that state and federal courts should be re-

quired to exclude evidence obtained by either state or federal officers through an unreasonable search. 338 U. S. at 40. On a subsequent occasion he reaffirmed his conviction that "we should be alert to see that no **unconstitutional** evidence is used to convict any person in America." See **Irvine v. California**, 1954, 347 U. S. 128, 149, 152.[4]

Mr. Justice Clark has gone just as far. Only stare decisis has persuaded him to support the ultimate **Wolf** conclusion that a state court may use unconstitutionally obtained evidence. See Clark, J., concurring in **Irvine v. California**, supra, at 138. In the federal courts he would apply the basic generalization of the **Weeks** case, "that evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions." See **Breithaupt v. Abram**, 1957, 352 U. S. 432, 434. And in the light of his dissatisfaction with the ultimate **Wolf** holding it is impossible to believe that he would restrict this considered generalization to cases where the violation of the Constitution has been by federal officers.

Finally, Mr. Justice Harlan has put his view of the impact of **Wolf** on **Weeks** quite succinctly:

> ". . . the only difference I can see between the **Wolf** decision and **Weeks v. United States**, . . . excluding in federal criminal trials evidence obtained in contravention of the Fourth Amendment, is the difference between state and federal courts; in each case, the substance of the constitutional command is the same, but the nature of enforcement varies with the forum." See

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[4] Mr. Justice Douglas also joined in a concurring opinion in *Lustig v. United States, supra*, preferring to base that decision on the broad proposition that "the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us." 338 U. S. at 80.

dissenting opinion in **Rea v. United States**, 1956, 350 U. S. 214, 218, 220.

The "constitutional command", if we understand Justice Harlan correctly, enjoins federal and state officers alike from unreasonable searches and seizures. Thus, the Justice seems to be saying that the **Weeks** case requires one type of enforcement of this comprehensive command in federal courts, while the **Wolf** case permits less drastic enforcement in state courts.

On the other hand, one Justice seems to have committed himself since and despite the **Wolf** case to a continuing recognition in federal trials of the original **Weeks** distinction between federal and state seizures. We think this is the necessary meaning of Mr. Justice Burton's concurrence in the dissent in **Lustig v. United States**, supra, 338 U. S. at 80, although we are not unmindful that he joined later in Mr. Justice Harlan's dissent in the **Rea** case, discussed above. In any event, no other Justice now in active commission seems to have approved the **Weeks** distinction since the **Wolf** decision.

In cumulative effect these several pronouncements by so many Justices of the present Court support the rational argument that the **Weeks** and the **Wolf** decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts. At very least it seems clear that this is a position toward which several Justices are strongly inclined, with one Justice apparently in disagreement and others indicating no more than that they regard the question as open. Certainly, neither the **Weeks** holding as to state-seized evidence nor our own **Shelton** decision can properly be regarded as binding precedents in the light of the subsequent **Wolf** ruling and the cited indications of the present views of so many justices.

On principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by violation of the Constitution should be excluded. In this area, as Mr. Justice Jackson has reminded us, decision "whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, 'for admissibility of evidence is governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' Fed. Rules Crim. Proc., 26." See **Irvine v. California**, 1954, 347 U. S. 128, 134-135. What then should be the controlling considerations when unconstitutionally obtained evidence is offered in a court of the United States? One influential consideration is that which moved Justice Holmes and Justice Brandeis in their celebrated **Olmstead** dissents. Mr. Justice Holmes put it this way:

> ". . . Government ought not to use evidence obtained and only obtainable by a criminal act. . . . I think it a less evil that some criminals should escape than that the Government should play an ignoble part." **Olmstead v. United States**, 1928, 277 U. S. 438, 469, 470.

This concern with the integrity of the judicial process must be most serious when the evidence has been obtained by a violation of the Constitution itself. The effectiveness of courts must always depend in large measure upon the respect which their processes command by reason of the integrity they reveal. From that point of view the courts of the United States, the ultimate guardians of the Constitution, cannot afford to play the "ignoble part" by themselves permitting the use of unconstitutionally obtained evidence, solacing and absolving themselves by deploring the unconstitutional seizure and pointing out that in some other proceeding sanctions can or should be

imposed against the violation of our fundamental law. This very point was made in the **Weeks** case with reference to evidence which federal officers had obtained by unreasonable search:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U. S. at 392.

But the **Wolf** case has made this reasoning equally applicable to the now equally unconstitutional seizures by state officers.

Beyond the issue of judicial integrity, we should not assume that the refusal of the federal courts to permit the use of improperly obtained evidence will have no effect in persuading state as well as federal officers to follow constitutional methods and procedures in obtaining evidence. In the **Weeks** case the Supreme Court went so far as to say that if articles can be seized illegally by federal officers "and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." It cannot rationally be argued that the constitutional protection is so gravely impaired by using such evidence in federal courts when a federal officer has violated the Fourth Amendment, but that there is no significant impairment when it is a state officer who has been guilty of an equivalent violation of the Fourteenth Amendment. Perhaps the sanction of excluding such evidence

from federal trials has a greater deterrent effect upon federal officers than upon state officers. But there is no calculus to measure such a difference, nor is it the kind of difference which warrants opposite conclusions as to the admissibility of the evidence.

The money in controversy should not have been admitted in evidence against appellant. He is entitled to a new trial at which this evidence shall be suppressed.

Reversed and remanded for proceedings consistent with this opinion.

Nos.
221
224

LIBRARY
SUPREME COURT, U. S.

MOTION FILED MAY 1 1959

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

Nos. 221 and 224.

JOSEPH COSTELLO,
Petitioner,
v.
UNITED STATES OF AMERICA.

JOSEPH JOHN CANNELLA,
Petitioner,
v.
UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE AND SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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UNITED STATES OF AMERICA.

(a) MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

Petitioners respectfully move for leave to file the annexed second petition for rehearing of the orders of this Court denying petitions for writ of certiorari in these cases, entered on October 13, 1958. Rehearing is sought at this time because this Court, on April 20, 1959, granted

certiorari in **Rios v. United States**, No. 40 Misc., October Term, 1958, which case, as is pointed out more fully in the annexed petition, contains a similar question to the second question and fourth question presented respectively in the Costello and Cannella petitions. The **Rios** case involves questions as to whether evidence obtained by state officers and used against a defendant in a federal prosecution may violate his rights under the United States Constitution, and if the evidence was unlawfully obtained, whether it is admissible in a federal prosecution when obtained by state officers without federal participation. The questions presented in the instant petitions for writ of certiorari include the issue whether evidence obtained by state officers is admissible in federal court despite the Fourth Amendment and the standards for the enforcement of Federal Criminal Statutes in federal courts.

Although this second petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time; and the court clearly has power, in its discretion, to entertain the petition. **Zap v. United States**, 330 U. S. 800; **Stone v. White**, 300 U. S. 643.

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(b) SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that this Court grant a rehearing of its orders of October 13, 1958, denying the petitions for writ of certiorari, and that a writ of certiorari issue to review the judgments of the Court of Appeals for the Eighth Circuit in the above-entitled cases as prayed for in the petitions filed July 25, 1958, and July 26, 1958.

Reasons for Granting the Rehearing and Issuing the Writ.

At the time of this Court's orders of October 13, 1958, this Court had not granted certiorari in **Rios v. United States**, No. 49 Misc., October Term, 1958, which presents the questions: "1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States," and "2. If the evidence was unlawfully obtained; was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?" The similar question presented by these petitioners in their petitions for a writ of certiorari is as follows:

> "Whether evidence obtained by state officers in a search and seizure found to be illegal in a proceeding in a state court of a state which follows the rule of exclusion is admissible in federal court, despite the Fourth Amendment and the proper standards for the enforcement of federal criminal statutes in federal courts."

Thus, the instant cases, as does **Rios**, involve the question of whether evidence obtained by state officers may violate

an individual's rights under the Constitution of the United States and whether such evidence, if unlawfully obtained, is admissible in a federal prosecution solely because it was obtained by state officers without federal participation.

In the four-count indictment in the instant case, count 1 charged petitioners Costello and Cannella with illegally transporting a revolver in interstate commerce in violation of 15 U. S. C 902 (e), Costello having previously been convicted of burglary. Count 3 charged the illegal receipt of this revolver by Costello in violation of 15 U. S. C. 902 (f). Count 2 was identical with count 1, except that it involved a different revolver. Count 4 was a conspiracy charge in which the overt act alleged was Cannella's obtaining these two revolvers. The facts on the issue here involved were summarized by the Eighth Circuit as follows (Costello Pet. App. 24):

> "Costello was arrested by St. Louis police officers and taken to the city jail where he was searched and questioned and discharged. The Cadillac car which he was driving when arrested was also searched. He denied having a key to the glove compartment of the car, but the police officers found one of the keys taken from him fitted the glove compartment lock. The officers opened the compartment with the key and took possession of a revolver contained in it, which was shown to be the revolver described in the indictment as having been received by him. The arrest, search and seizure were found to have been illegal under Missouri law in a proceeding in the Missouri State Court **and it is not contended for the government that they were legal under the federal law. But it was not shown that any federal officer took part in the search** and the court's refusal to suppress the gun and receiving it in evidence was sanctioned by the decision

of this Court in Jones v. United States, 8 Cir., 217 F. 2d 381, 382-383. Cf. United States v. Benanti, 2nd Cir., 244 F. 2d 389, 392. The Court's refusal to suppress the guns was without error." (Emphasis ours.)

The earlier decision in **Jones v. United States**, supra, was that evidence seized by state officers was admissible no matter how obtained when federal officers did not participate in the search.

The government's argument opposing certiorari recognized that both courts below based their affirmance on the ground that no federal officer participated in the search. It said however that this issue was not necessary for disposition of the case because the gun involved in Count 2 was not seized at the time of the arrest and "was not the subject of a motion to suppress" and that the other gun "was not the major part of the evidence of the crimes charged." But the position of the Government ignores the fact that the Eighth Circuit would have reversed this case on all counts because of its rule that where illegally obtained evidence is involved that court will not weigh its capacity to influence the jury. Thus in **Honig v. United States**, 8 Cir., 208 F. 2d 916, 921, the Court, in considering the admission into evidence of illegally seized blank stock certificates said:

> "Whether on the other hand the certificates might be contended to be of such slight relevance to a proving of the offense charged, in relation to appellant's intent, as not to be likely to have caused their admission to constitute a factor in the convicting of appellant we shall not consider. **An appellate court will not presume to evaluate the degree of prejudice in probativeness from relevant evidence obtained by illegal search and seizure whether the relevance of**

such evidence be immediate or remote. And no more will it undertake to appraise the effect of any irrelevant evidence so obtained and used where such evidence, though not relevant to the offense charged, is nevertheless not utterly innocuous but can debatably be said to be possessed of some capacity to influence the jury.

"A condoning of the use of any such evidence would of itself, against timely and proper protest made, amount to a deprivation of the immunity from unreasonable searches and seizures guaranteed by the Fourth Amendment. Cf. Weeks v. United States, 232 U. S. 383, 398, 34 S. Ct. 341, 58 L. Ed. 652. Constitutional guarantees of fundamental individual rights are entitled to whole-hearted judicial vindication, except where they have, by lack of timely and proper assertion or otherwise, been waived.

See also **United States v. Pugliese**, 2 Cir., 153 F. 2d 497, 499, where the Court said: "Only in case the prosecution which itself controls the seizing officials, knows that it cannot profit by the wrong, will that wrong be repressed."

It should be noted that counsel for the Government admitted that the entire indictment in this case was the result of the arrest of Costello (R. 32). And petitioners in their motion to suppress sought to suppress all of the evidence seized from Costello's automobile on February 27, 1956, the date of his arrest, and "any evidence gained directly or indirectly as a result of such search and seizure" (R. 29).

The government further argued in opposing certiorari (Brief for the United States in Opposition, pp. 10-11):

"If, however, the Court should deem the issue appropriate for resolution, we submit that the ruling of

the court below is correct. Evidence obtained by state officers without federal participation has been recognized as admissible in federal prosecutions ever since the federal rule of exclusion was first formulated . . . The facts that here the state has a rule of exclusion and that the evidence was actually excluded by a state court, do not change this principle. As the Ninth Circuit ruled with respect to a similar contention in **Rios v. United States**, decided May 26, 1958, petition for certiorari pending, No. 40 Misc., this Term, there is 'no reason why the same rule should not be applied where the determination that the evidence was illegally seized by state or local authorities is made by a state trial court. The "silver platter" doctrine operates on the assumption that the illegality of the state seizure has been established. How it has been established is immaterial.'

"Federal courts are not and should not be concerned with disciplining state officers. So long as federal officers are not involved, the federal courts may properly receive evidence which proves the violation of federal law. It is not a part of the federal court's jurisdiction or province to correct state officers."

The issues here involved are the same as in Rios. Certiorari should be granted and the instant cases should be set for oral argument with the **Rios** case. At the very least, in the event that the **Rios** case is decided in favor of petitioner, this Court's concern with the uniform administration of criminal justice will warrant a remand of the instant cases to the Eighth Circuit for re-examination in light of that case.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing a writ of certiorari issued to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

We hereby certify that the foregoing Second Petition for Rehearing is presented in good faith and not for delay

and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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